Studies in

THE FAMILY LAW OF ISLAM

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To

K H U R R A M

Friend

Brother

and

Comrade

—K. A.

PREFACE TO THE SECOND EDITION

MARRIAGE Commission Report X-Rayed appeared in January 1960 and was welcomed by scholars and students of Islamic law as an important and timely contribution to the current debate on the family law of Islam. It is encouraging that the second edition of the book is appearing within one year. Revisions have been made here and there but essentially the argument of the book remains unchanged. An important change, however, has been made in the name of the book which has now been changed to *Studies in the Family Law of Islam*. The reason for the change of name is simple : the earlier name was in keeping with the needs of the controversy which was rampant in the country. The book is now being re-presented for the lasting value of its articles. As such the Editor has thought it advisable to give it a name more in keeping with the contents of the book.

KHURSHID AHMAD

1, NEW QUEENS ROAD
KARACHI
14 August 1960

PREFACE TO THE FIRST EDITION

The Muslim world is in a ferment to day. Followers of Islam are trying to break asunder the chains of political servitude and to rise up from their cultural stupor. The spirit of Islam is being rediscovered and a new awakening is manifest throughout the Muslim world. But the renaissant forces of Islam are being met with resistance by the lovers of the old decadent order and the upholders of the reactionary forces of westernism and the outdated modernism. This clash is rampant here, there and everywhere.

The importance of the controversy over the Marriage Commission Report lies in the fact that it portrays the nature and

significance of the clash in its true colours. On the one hand there is the viewpoint of the renaissant Islam which stands for reform and progress in accordance with the pristine principles of Islam, and on the other hand is the viewpoint of the so-called modernists who want to blindly follow the west, and, so to say, 'reform' Islam to suit their western standards. Both these viewpoints are best expressed in the discussion over the Marriage Commission Report and although the report has been shelved, the controversy is alive. And the present book epitomizes the entire controversy and, as such, makes a real contribution towards the understanding of the mind of the Muslim East.

The book was actually completed in the first quarter of 1958 but because of a host of difficulties it could not be sent to the press. It was only in the middle of 1058 that it was sent to the press. But that was not the end of our difficulties. So many new complications cropped up and the printing was delayed so much so that the book is now appearing in the last quarter of 1959. This delay was simply beyond our control and is regretted.

Although the book has been delayed by over one year but the contents are as fresh as ever. And we have disdained from revising it in the light of new changes for the simple reason that it preserves an important controversy and the historical importance of the book should not be marred by a revision here and there. We hope that the reader will keep the fact in view that the book was completed before the middle of 1958.

This book is important not only because it presents one of the most significant controversies of the present-day world of Islam but also because there is a report in the press that certain sections are pressing for a reconsideration of the Report. As such this book is very timely and would apprise the public of all the pros and cons of the Report. We hope that the publication of this book will help towards a better understanding of the world of Islam in general and of the problems of family law in particular. And with this hope we present the book to the public.

KHURSHID AHMAD

15th November 1959

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Chapter 1

INTRODUCTION

IT HAS been well said that reformers try to present old wine in new bottles. But in this country we have been faced with a new class of reformers—if reformers they can at all be called! They have been trying to present *new wine in old bottles*.

Muslims love their ideology and traditions. They are proud of their history and want to move ahead continuing their historic march towards their glorious destiny. They want to establish the Islamic order of life and thus bring about an Islamic renaissance. But there is a class of people who suffer from a severe inferiority complex and are spell-bound at certain achievements of the West. Their eyes are dazzled by the exterior sheen and glory of Europe and their ambition is humbly to adopt the modern way of life. They look to the West for guidance in every field of life and try to 'prove' that Islam also stands for those very values. Their approach is out-and-out apologetic and they lack in vision and self-confidence.

These modern apologists have been rendering their 'valuable services' to the cause of Islam for the last so many years. But recently they have adopted a new technique : that of presenting new wine in old bottles. They start their essays with moving sermons on the superiority and dynamism of Islam. They use Islamic terms but very adroitly give to those terms a new-fangled meaning. If they are influenced by Communism, they won't talk of the creed of Marx and Lenin. Instead, they would try to mislead the people by talking about the theory of *al 'Afv* and *Niẓām-i-Rubūbīyat* and *Maslak-i-Ghifārī* and the like. If they are influenced by modern Liberalism, they won't make bold to express their opinions. Instead, they would try to impart new meanings to the Islamic terms of *Ijtihād*, *Istiḥsān* and *Iṣṭiṣlāḥ* and would like to blow off the entire teachings of the Qur'ān

and Sunnah by using their powerful batteries of *Ijtihād*.

This is a clever technique and a dangerous conspiracy. Unfortunately, the reins of power and authority happen to be in the hands of political adventurers who are devoid of the will to establish the Islamic order in this country and who are patronising these 'servants of Islam.' The gravity of the situation has thus increased manifold. It seems that these people have taken a leaf out of the book of Turkish liberal and nationalist thinkers who adopted this very technique for corrupting the teachings of Islam.[1] Little perhaps do they know that it is a very dangerous game.

Some people also seem to suffer from a perverted ambition to become Ataturk. Without paying any heed to the historical factors which gave birth to Kamalism, they want to behave in a dictatorial way and purge Islam from this country. Mustafa Kamal had at least the merit of being bold and frank—he openly *discarded* Islam, while these pseudo-Kamals do not even have the courage to be frank—they want to *distort* Islam and thus discard it by employing back-door methods.

They fail to appreciate that the history of the Indo-Pakistan sub-continent is materially different from that of Turkey. The strength and the influence of the revivalist movements in this sub-continent have been very great. Turkey was a tottering empire and the reformist movement was very weak. Despite that, it did not succumb to secularist influences without sustained resistance. The movement of General Chakmak is one of the many instances with which the students of history are familiar. In this sub-continent, on the other hand, the renaissance movement of Islam has been extremely strong. Mujaddid Sirhandi, Shāh Walīullah, Sayyid Aḥmad Shahīd, Shāh Ismā'īl, 'Allāma Shiblī, Dr. Muḥammad Iqbāl, Maulāna Maudoodī are the luminaries who have established this movement on a firm foundation. The Mujāhidīn Movement, Khilāfat Movement, Pakistan Movement, the Movement for Islamic Constitution, all have given a new air to the ideological and cultural climate of this country. All the forces of history are here arrayed against Secularism and Kamalism and if the pseudo-reformers fail to read the writings on the wall, they will sooner or later meet their Waterloo.

1. See Urel Hyde, *Foundations of Turkish Nationalism* (Luzac & Company, Ltd., London, 1950), pp. 53-70, 82-103.

Similarly, it is ignored that Turkey adopted the Western way of life when Western civilisation was at the zenith of its glory. Now, modern civilisation is in the throes of a great crisis and the modern world itself is searching for a new way of life. Only one devoid of all vision can fail to notice the tremendous change in the historical conditions obtaining now in this second half of the twentieth century.

And who can deny the fact that, whatever his views, Mustafa Kamal was a hero of the Turkish people! His services to the cause of Turkey were great and his personal influence was immense. Can any intellectual in this country boast of even a smithering of the influence which Ataturk wielded on his people? If not, how can that sort of programme succeed in this country?

Then, is it not a fact that Modern Turkey has itself now revolted against the anti-Islam policy of Ataturk and his colleagues? Was not Mustafa Kamal's party defeated in the very first free elections? Did not the Democrats win the election on the promise of repudiating the anti-religious policy of their predecessors? The fact is that in Turkey a strong reaction against secularism has already set in. The movement is gaining strength at a tremendous speed. Even thirty years of secular rule could not suppress the Islamic ambitions of the Muslims of Turkey and a strong movement for Islamic revival is now afoot. If a tree is known by the fruit it bears and if a movement is known by the results it bequeaths, then the fate of the secularist movement in Turkey should act as an eye-opener to the tin-gods of this country.

It is beyond the least shadow of doubt that the ambitions of these pseudo-Ataturks are fore-doomed to failure. But these activities of theirs will give birth to a social schism in our society. They will make enactments which will run counter to the hopes and aspirations of the people. A disharmony between the objectives of law and the wishes of the demos would occur. The government would try to enforce the law: the people would resist its enforcement by fair means or foul. The respect for law, which even at present is at a low water-mark, would further dwindle and the energies of the nation would be wasted in these internal conflicts. No well-wisher of Pakistan can permit such a situation to grow. But such a situation (God forbid!) may develop if the recommendations of the Commission on Marriage

and Family Laws are accepted and given legal effect to. The Report is a product of the attitude of mind discussed above. It is a poisonous pill which has been offered with a thick sugar-coating. This survey is being offered to the public with a view to unveiling the real dangers that are embedded in the approach and the recommendations of the Report.

II. THE PROBLEM

THERE is no doubt that the approach of the Commission has been incorrect and inappropriate. Decidedly, it has been destructive. But the question is : *How is it that these people are able to purvey such views and find support in certain sections of the society ?*

Sober reflection reveals that we are faced with a host of complex problems. Our social conditions are far from desirable and the westernised intelligentsia are trying to exploit this situation for their own ends.

Muslim society has been caught in a gradual process of disintegration. In the Indo-Pakistan sub-continent the social system of Islam could not fructify in its ideal form. Ever since the advent of the British the pace of decay has accelerated, so much so that now most of the Islamic injunctions about women's rights are not being fully complied with. Law is too defective to protect them. Alien customs have crept into our social life and have chained it down to un-Islamic modes of behaviour. Women's education is just non-existent. In short, to-day the position of our women-folk is not the least wholesome. At places the condition is rather pitiable. It is this peculiar situation which has provided the pseudo-reformers with ample opportunity for exploitation. And they are trying their level best to seize it and impose Western culture upon the country. Some women have unwittingly fallen a prey to their trap. It is, therefore, essential to thrash out the problem in a sober way, find out the factors that are responsible for the contemporary social crisis and to formulate proper lines of reform.

III. SOME THOUGHTS ON CAUSES OF OUR SOCIAL CRISIS

THE social crisis which confronts us to-day is the product of a

multiple of causes. Some of them may be summed up as follows.

(1) Muslim society, due to a number of factors, could not achieve its ideal form in this sub-continent. Hindu customs influenced our social life and the position of women went on deteriorating with the passage of time. Islam gave women a dignified status. It conferred upon them social, economic and political rights. It made acquisition of knowledge and learning a compulsory obligation upon every man and woman alike. It established equity and equality between the sexes and envisaged a culture wherein both co-operated with each other in the best possible way and contributed their respective shares towards social progress. But, under the influence of alien customs and through the encroachments of vested interests, Muslim social life began to be corrupted. Wealthier classes exploited the law for their petty ends and, through their example, the society on the whole suffered a decay. The position of woman worsened and she was denied most of the rights that Islam has endowed upon her. This has happened because Islamic State—which is the protector of the weak and the upholder of the Islamic law—did not exist in its real form. With the disappearance of the Islamic State, Muslim society began to disintegrate, for it had lost its sheet-anchor. And the result is what we see around us.

(2) Ignorance of the people about the injunctions of Islam is another basic cause of the present injustices and malpractices. It is extremely unfortunate that even the Muslims do not know what Islam is and what it demands from them. Their knowledge of Islam is extremely poor, narrow and defective. And, by and large, it is because of ignorance that they are not obeying the *Sharī'ah*. Men do not know their rights and duties. Women also are unaware of their rights and responsibilities. Because of ignorance they are living in utter darkness. If their ignorance is removed, they can adopt Islamic way with over-flowing zeal and fervour. Unless their standard of knowledge is raised, they cannot be brought out of the present morass. They are not disobeying Islam—they fail to follow it because they do not know what God and His Prophet have asked them to do.

(3) Women's illiteracy is another important factor which contributes to the present chaos. Absence of education breeds inferiority complex. Our women-folk have no consciousness of

their real position. They generally reconcile themselves with the *status quo* or else get totally uprooted from Islamic tradition, start aping foreign ways and customs and thereby lose their culture and civilisation. Women's education is very essential for their proper emancipation. But it is doubly unfortunate that women's education—as it developed during the British rule—has proved a greater evil, for it has not only failed to train them in the traditions of Islamic culture and society but has done a lot positively to transform them into society butterflies. This education, therefore, instead of being helpful, turned out to be injurious to the cause of their proper emancipation. For it did all it could to drag our women-folk away from Islam and make them imbibe the Western culture. This became a force of disintegration and tore the society asunder.

(4) Law is another important contributory factor. The Anglo-Muhammadan law is a hybrid product and does not confer upon our women all the rights that Islam has given them. The British-imposed law of the land even deprives them of their share in inheritance on the pretext of customary law. It is based on those legal concepts which have no relevance to Islamic legal thinking. It makes the procurement of justice so difficult and so complex that legal remedies have become ineffective. This inadequacy of law and the complexity of legal procedure have gone a long way towards making the conditions as bad as they are.

(5) Then, the most important cause of disintegration has been the influence of Western culture.

The recent contact of Islamic civilisation and Western culture occurred at that phase of our history when Muslim power was on the wane and Muslim society was in the grip of crisis and disintegration. The West, on the other hand, enjoyed political dominance over the Muslim world and had every power to impose its ways upon us. It created a class of natives who became blind imitators of the West and acted as an agency for the communication of Western culture. (Toynbee calls this the 'Babu-class'.) Through education, propaganda and persuasion, art and literature, cinema and photography, Western culture began to infuse into our society and bring about a tussle between the 'Old' and the 'New.' The Government patronised these activities and now after the dawn of Independence the spiritual

children of the West are patronising them. This has created the worst social crisis in our society. Corruption is increasing; free mingling of the sexes is getting currency, the institution of family is suffering heavy strains and our entire social life is faced with the danger of disintegration and collapse.

(6) Partition of the country has also adversely affected the society in this direction. Customs and traditions have a very basic importance in the life of a people. They regulate the social life in a very natural way. With large-scale migration of population and a sudden urbanisation, social manners and mores have been thrown to the winds. The rights which were safeguarded by custom and society are now being trampled underfoot because the sanction behind them has evaporated.

Severe economic dislocations have also come in the train of Partition. Some people have been robbed even of their ordinary means of subsistence and as such economic poverty has gone a long way towards reducing the position of women to insignificance. Others have become wealthy in no time, and it is common knowledge that such swift-earned wealth often generates social complexities and corruption.

Thus we find that there are numerous causes of the present social crisis and unless these causes are removed and a well-thought-out social policy is formulated no patch-work can prove helpful.

IV. TOWARDS THE REFORM

AFTER surveying the fundamental causes of the malady that besets us we are in a position to discuss broadly the lines of social reform.

Some basic considerations. First of all we must give proper thought to certain basic considerations. If we are clear about these basic points, our social policy would be well integrated and free from contradictions. Otherwise, we would be caught in a confused state of affairs, moving hither and thither like a shuttlecock and with no clear destination before us.

First is the question of our destination. Do we want to adopt the Western culture or the Islamic culture ? If our goal is Islam, then let us clearly step ahead towards it. But if we want to adopt

the Western way, then why this lip-service to Islam? The 'double talk' is one of the greatest menaces that haunt the world to-day. We must wriggle out of it. Otherwise we would reach nowhere. We want our leaders to realise that our destination is Islam and not Western culture. Our entire policy should be directed towards this objective and all that is repugnant to this ideology should be fought against and mitigated.

Our abhorrence for Western culture is not the product of any prejudice. We feel that Western culture is unsuited to our needs and conditions. We have our own culture and our own traditions and conventions. Islam has given us all that we require and there is no need of any import of values from the West.

We also hold that Western culture has failed to establish a good moral society in the Occident itself. The free mingling of the two sexes has proved a curse for human civilisation. The calm and poise of society has been shattered. The institution of family has been shaken to its roots and is tottering like a castle of sand. Education and training of the new generations have suffered a staggering blow and the society is producing an army of teen-age criminals who have become a headache for all and sundry in an upward spiral. Life has been robbed of its 'human touch' and beastly behaviour is becoming manifest everywhere. The moral crisis has assumed unknown proportions. This situation has baffled even the best of the Western brains and they are fed up with this rotten culture. The well-known philosopher, Bertrand Russell, comments :

'It seems unquestionable that if our economic system and our moral standards remain unchanged, there will be in the next two or three generations a rapid change for the worse in the character of the population in all civilised countries and an actual diminution of numbers in the most civilised. The problem is one which applies to the whole of Western civilisation.'[1]

A leading woman medical scientist, Mrs. Hudson Shaw, says :

'Now when our civilisation is indeed tottering on the verge of collapse we see that in fact the last decades have been marked by a choice of license for both the sexes rather than discipline. The result has been an enormous waste of creative power. Prostitution and promiscuity combined with the prevention of conception and not combined with any kind of creative results whatever,

1. Bertrand Russell, *Principles of Social Reconstruction* (George Allen & Unwin, Ltd., London, 1954), p. 125.

homo-sexuality in both sexes, and various forms of abnormality represent to us the unwholesome swamp into which the waters of energy have flowed. Is this a symptom or a cause of our collapse? Both, I think.'[1]

And the late Professor C.E.M. Joad expressed the following opinion on this point :

'What a mess we have made of things .... I believe the world would be a happier place if women were content to look after their homes and their children, even if some slight lowering of the standard of living were involved thereby.'[2]

Thus it is futile for us to adopt a system that has been tried and found wanting. All our endeavours should be directed towards establishing the Islamic social order and towards saving the society from the forces of disintegration arising from within and from without.

Secondly, it must be clearly realised that the method of reform should be such that it breeds amity and co-operation between man and woman. Any movement that is directed towards group-tussle and sectional hostility is destined to destroy the social poise of the society. A movement for emancipation that generates hatred between the sexes and destroys their mutual confidence and co-operation is a movement for the ill. It can lead to the good of none. Therefore every care should be taken while devising the plan for reform lest it defeats its own purpose.

And, lastly, no attempt should be made to thrust anything upon the people from above or to enforce something with the brute force of law over a people who deem it to be against their culture and values. Social change is brought about through education, propaganda and persuasion and not merely with the club of law. Law has an importance of its own, but it must be applied after other factors of reform have been properly used and harnessed. If proper balance is not maintained between these various factors, it is feared that the programme of social reform will prove to be no more than a vehicle of social disruption and the peace and tranquillity of society will be destroyed just because of wrong approach to the problem.

Some lines of social reform. Keeping these basic considerations

1. Maude Royden, D. D., C. H. (Mrs. Hudson Shaw), *Sex and Commonsense* (Hurst & Blackett, Ltd., London), Chapter IX.

2. C. E. M. Joad, *Variety*, 1 December 1952.

in view the task of social reform should, in our opinion, be performed on the following lines.

(1) The teachings of Islam should be disseminated on a wide scale. Press and pulpit, radio and cinema, mosque and school should all be used for the propagation of the basic injunctions of Islam so that moral consciousness of the people is properly aroused and strengthened and social climate is made congenial to the change for better. In this respect all the modern dangers to the institution of family and the moral fibre of society should be adequately eliminated, and the challenge of the West should be aggressively met. Education and propaganda are the best vehicles of social reform. Through them bad customs can be eliminated and new traditions established. This change will flow from the hearts of the people and they will cheerfully bring it about, so that they may be successful in the life here and hereafter. This is the first requisite of social reform and without it no law can prove effective.

(2) Education of women is the second basic ingredient of a healthy scheme of reform. Women should be educated to develop their proper personality and to become good, pious and virtuous house-wives, mothers and citizens. Islam believes in a functional distribution of work between the sexes and our system of education should be such as to train our sisters in the arts and crafts of womanhood. This education will also awaken in women a proper consciousness of their rights and responsibilities, and the greater the consciousness, the lesser would be the chances of exploitation and injustice.

(3) Social institutions for the uplift and welfare of women should be established. There should be widows' homes, women's industrial homes, maternity and other hospitals, *zanana* parks, clubs and other social and recreational centres. All possible facilities should be provided to women through social institutions within the limits of the *Sharī'ah* so that they may be able to enjoy the amenities of life in the best possible way.

(4) The present law should be amended in such a way that it

(*a*) gives legal effect to all those rights of women which Islam has conferred upon them;

(*b*) provides proper remedies for injustices that have crept into the society because of ignorance or alien influences; and

(*c*) creates an efficient machinery for the swift dispensation of justice. In this respect the establishment of Matrimonial Courts is a most welcome suggestion.

(5) A popular movement to make the Government Islamic and to bring up a capable and God-fearing leadership which may devote all its energies towards the solution of the country's ills. The success of the scheme for social reform would ultimately depend upon the sincere efforts of the leadership and the general tone and temper of the State and society.

These are the broad outlines of a healthy scheme for social reform and everyone who gives proper thought to the problem would come to the conclusion that these are the correct lines for reform.

V. SCHEME OF THE BOOK

THE above discussion is sufficient to show the basic difference between our approach and that of the Marriage Commission. The present book is a detailed examination and evaluation of this Report.

The first chapter consists of the Commission's Questionnaire and the reply thereto from the pen of the renowned Muslim thinker and scholar Maulana Abul 'Ala Maudoodi. It is followed by the Marriage Commission's Report which has been given in full so that the reader may be able to see for himself the approach of the Commission and that the case of the Commission may be presented by the Chairman of the Commission himself. This Report has been analysed and X-rayed by Maulana Amin Ahsan Islahi, an ex-member of the Islamic Law Commission. His essay offers a detailed refutation of the arguments of the Report and deserves to be read with care and devotion. In the article that follows, the Editor has offered his own reflections upon the Report. As an appendix has been attached an article by a woman leader (formerly Pakistan's Ambassadress at Brazil), Princess Abida Sultana.

It may be added that every contributor is responsible for the views expressed in his or her essay while the Editor is responsible for his own contributions, for the translation and for the editorial notes.

This book is being offered with a threefold objective :

First, to present before the public the real teachings of Islam.

The dearth of Islamic literature in the English language is a great problem which besets the Muslims to-day. This book will introduce the reader to the Islamic viewpoint on marriage and other allied problems and will provide him with the criteria to judge the worth of those ideas which our modernists harp upon day in and day out.

The second object is to analyse and X-ray the Marriage Commission's Report.

It is a critical appraisal of the Report and shows the hollowness of the arguments put forward by the Marriage Commission. It also points out the dangers inherent in the recommendations of the Report and warns the people against the real designs of our power-drunk politicians and their 'fellow-scholars.' It is a challenge to the aggressive modernity of the 'Protestant' thinkers and exposes their feet of clay. It presents a thorough X-ray of the minds of the new 'scholars of Islam' and clearly reveals their confusions, contradictions and real intentions.

Lastly, it is meant to dispel the misgivings and illusions of the educated class of Muslims whose knowledge of Islam is meagre and of the Western students of Islam whose sources of information are very limited.

This book is being offered with these ends in view.

ACKNOWLEDGMENTS

I AM indebted to Maulana Syed Abul 'Ala Maudoodi, Maulana Amin Ahsan Islahi, Maulana Zafar Ahmad Ansari and Khwaja Abdul Waheed for their kind suggestions and scholarly guidance. Maulana Abdul Majid Daryabadi was kind enough to give me many a suggestion and I thank him for them. I have also availed of the writings of all of them, particularly of those of Maulana Maudoodi.

Major portion of the translation of Maulana Maudoodi's reply to the Commission's Questionnaire has been done by my friend Mr. Zafar Ishaq Ansari. Rest of the translations have been done by the Editor himself.

Khurshid Ahmad

1, NEW QUEENS ROAD
KARACHI

Chapter 2

THE FAMILY LAW OF ISLAM

[THE QUESTIONNAIRE AND ITS REPLY]

By

SYED ABUL 'ALA MAUDOODI

The Commission on Marriage and Family Laws appointed by the Government of Pakistan issued a Questionnaire to leading thinkers of the country in particular and to the public in general to elicit their opinion over the problems involved. The Questionnaire was issued about the end of 1955 and the final date for receipt of replies was 15 February 1956. Maulana Abul 'Ala Maudoodi also answered this Questionnaire and his reply was published in the monthly *Tarjumān al-Qur'ān*, Lahore (Vol. 45, No. 4). English translation of this reply, along with the original Questionnaire, is being given in the following pages. This will show how Islam-loving elements tried to assist the Commission by furnishing it with the Islamic viewpoint on the issues that confronted it. It does not lie in the mouth of the apologists of the Report to say that they were not supplied with the necessary material or were not forewarned.—*Editor*.

Q. **No. 1.** Should *Nikah* be performed by State-appointed *Nikah-Khwans* only ?

Ans. No. In an Islamic society there is no room whatsoever for any kind of priesthood. Every Muslim can solemnise *Nikāḥ* in the same manner as he can lead prayers. Not only that; according to Islamic *Sharī'ah*, even the couple themselves can enter into marital contract by the mere expression of their consent before two witnesses. If an office for solemnising *Nikāḥ* is established by statute, it will lead to either of the following two consequences. A *Nikāḥ* not solemnised by somebody other than the official 'priest' would either be deemed void and illegal or recognised as legally valid. If such a marriage is deemed illegal and void, Islamic *Sharī'ah* and the law of the land will come into conflict, for any *Nikāḥ* that fulfils the requirements of the *Sharī'ah* will be perfectly in order. But if it is to be recognised as valid, what sense is there in enacting such a superfluous legislation ?

Q. **No. 2.** Should there be compulsory registration of marriages and, if so, what machinery should be provided therefor ? What should be the penalty, if any, and who is to be penalised for non-registration ?

Ans. Arrangement for the registration of marriages in a Public Register is, of course, useful, *but it should not be made compulsory*. One of the rules laid down by the *Sharī'ah* for the performance of *Nikāḥ* is that it should take place in the presence of two witnesses and that the ceremony should be made publicly so that the relationship of the couple may become fully known to their relations and acquaintances in particular and to the society in general. In this manner there arises no difficulty in producing witnesses of *Nikāḥ* if there crops up any dispute about the *Nikāḥ* in future. Still, more facilities for the establishment of evidence can be provided in two ways :

First, by publicising on a large scale a standardised *Nikāḥ-nāma* (marriage form) wherein people may enter all the necessary particulars concerning the *Nikāḥ* at the time of marriage and get the signatures of the witnesses affixed.

Secondly, a register for the registration of marriages can be

placed in every locality so that anybody desiring the registration of marriage may do so. To safeguard their interests, it is hoped that people will generally avail of both the facilities of their own accord.

As for compulsory registration of marriages, there are two positive disadvantages in it. First of all, those who do not follow this procedure will be penalised and there would be an addition of a hitherto non-existing offence. This will add to the menacing curse of litigation. Secondly, the courts will have to refuse to grant recognition to unregistered marriages, although a marriage solemnised before two witnesses is held proper by the *Sharī'ah* and the court has no competence to deny its validity. Again, it is also worth consideration whether children born to parents of unregistered marriage will be deemed as illegitimate and deprived of their rightful inheritance. If it is not intended to go to this extent, then compulsory registration loses all meaning and significance.[1]

Q. No. 3. What machinery should be provided to ensure that the marrying parties have freely consented to marry each other, and that neither of them has been a victim of undue influence?

Ans. For legal purposes it is not necessary to ascertain whether the marrying parties have freely consented to marrying each other. Unless it is proved that either of the two parties has obtained the other's consent under duress, it will be presumed that the marriage has taken place by mutual free consent. According to the Islamic *Sharī'ah*, expression of this consent must necessarily take place in the presence of two witnesses. The

1. Sometimes it is said that the registration must be made compulsory because civil and criminal courts very often face pretty complex problems as to the 'validity and existence of *Nikāḥ*.' For instance, there have been cases when two persons claim the same woman as wife and, because of the lack of any definite documentary proof, it becomes difficult to award a decision. Registration of marriages will solve this problem.

A critical perusal of this argument will show that the assertion is superfluous. The problem cannot be solved by the mere introduction of this system which has its positive disadvantages too. Only the venue of the problem will be shifted. In that case *Nikāḥ-nāmas* will be forged and all other illicit practices, which are a matter of common knowledge to all those who have even a nodding acquaintance with the malpractices rampant in these circles, will be resorted to. The evil will remain there; it will only assume different channels —*Editor.*

marriage of an adult male is not proper unless he consents to it in the presence of two witnesses in clear words. In the case of a girl (if she happens to have attained puberty), even though oral consent is not necessary, it has been provided that if she weeps loudly it would be taken to evince that she is not agreeable to the marriage. Thus the *Sharī'ah* has itself prescribed a method for ascertaining consent. And this should suffice. If any undue pressure has been put upon either of the two, the burden of proof lies on the plaintiff. The law does not require any proof for the *absence of pressure*. It does so only for its presence, if anybody so alleges. For, demanding proof for absence of pressure will not only completely frustrate the basic purpose of law, but also create a good many practical difficulties, which will merely aggravate the complexities.

Q. No. 4. Would you prevent child marriages by legislating that no man under eighteen and no woman under sixteen shall enter into a contract of marriage?

Ans. No law is needed to check child marriages. Moreover, fixation of the age of eighteen years in the case of males and sixteen years in the case of females is absolutely uncalled for. In our country a boy attains physical puberty much before eighteen and a girl much before sixteen years. Fixing these ages as minimum can, therefore, be taken to mean only one thing: that we are opposed only to the establishment of marital relationships between boys and girls of less than the legally prescribed minimum ages, while we would have no objection to their establishing non-marital sex-relationship. The Islamic *Sharī'ah* has refrained from creating such artificial restraints because they are unreasonable and unnecessary. Instead of doing this, Islam has left it to the discretion of the people themselves to decide as to when they should marry and when they should not. With the popularisation of education and the intellectual development of our people, their consciousness and understanding will grow and with it will increase their ability for a proper exercise of their discretion. And all this will lead to an ever-increasing fall in the proportion of child marriages which are not very common in our society even now. The fact is that often genuine needs of a family strongly press for child marriage and it is for this reason that the Islamic

Sharī'ah has kept the doors thereto open. In view of these needs, I would emphasise that child marriage should necessarily be kept permissible. As for checking its abuses, we should place our main reliance on education as also on other means of public awakening instead of on legal measures. After all, the rod of law is not the only panacea to cure all the ailments of a society.

Q. No. 5. Is the fixation of these age limits prohibited by the Holy Qur'ān or any authoritative *Hadith* ?

Ans. There is no explicit prohibition of fixing age limit for marriage either in the Qur'ān or in the Ḥadīth. But the permissibility of child marriage is proved by *Sunnah* and actual examples are available in authentic Aḥadīth. The question now is: On what grounds can we prohibit a thing which is permissible in the *Sharī'ah* ? Fixing an age limit by law means that a marriage taking place below this age will be held illegal and the law courts will not recognise it. Does there exist any sanction in the Qur'ān or the authentic *Aḥādīth* for nullifying such marriages ? In fact, this is a very misleading question. Fixation of age has both positive and negative implications. It amounts to tabooing all marriages solemnised earlier than the prescribed age limits. Ignoring this negative implication and merely by asking whether the Qur'ān and the Ḥadīth contain injunctions to prohibit such a fixation of age limits, you are putting before us just a part of the question, and this is quite misleading. The real question is: *Do the Qur'ān and the Ḥadīth contain anything which may justify prohibition of marriages before a definite age ? And the answer is definitely No.*

Q. No. 6. Do you agree that any condition may be inserted in the marriage contract which is not repugnant to the basic principles of Islam and morality, and that all such conditions shall be enforceable in a law court ?

Ans. There are two parts of the question. The first is whether such conditions can be inserted in a marriage contract. The reply is in the affirmative. But it does not imply that such conditions should under law be made essential parts of the marriage contract and be included in the standard marriage forms published by the Government. The *Sharī'ah* has left this matter entirely to the contracting parties of a marriage and has given them the freedom mutually to agree to any permissible conditions. To go beyond this limit and to give these conditions legal effect or to sanctify

them by custom is both theoretically incorrect and practically injurious. Experience too has proved that matrimonial contracts in which matters were settled by mutual consultation, on the basis of mutual trust and in which the contracting parties did not try to hedge themselves by numerous artificial terms and conditions, have generally proved successful. These terms and conditions, far from engendering concord and amity, plagued the family life with discord and strife. The reason is that in such cases the very relationship starts from distrust. Legal enforcement of such artificial conditions cannot simply be made on the plea that they are not repugnant to Islam and morality, because merely being not repugnant does not necessarily mean that they must be adopted and legally enforced.

The other part of the question is whether or not law courts can enforce those conditions which are contained in the marriage contract and are, at the same time, not repugnant to Islam and morality. The answer to this question is that, while enforcing all those conditions of marriage which are over and above the conditions laid down by the *Sharī'ah*, the law courts should see not only that they are not repugnant to Islam and morality, but also that they are fair and reasonable for the contracting parties in view of their personal circumstances.

Q. No. 7. Do you agree that it should be enacted that it would be lawful to provide in the marriage contract that the woman will have the right to pronounce divorce exactly in the same manner as the man ?

Ans. If, while consenting to marry, the woman declares that her offer of marriage is qualified by the condition that she would be free to pronounce divorce upon her husband when she so desires and if the same is accepted by the husband, then the condition may legally be tenable. This is a case of delegation of divorce right (*tafwīḍ i-ṭalāq*) and the jurists have permitted it. But it should be borne in mind that the legality and permissibility of the delegation of divorce right is altogether different from trying actually to making it a current practice in Islamic society. From the purely legal point of view, a man can delegate his right of divorce to his wife in the same way as he can delegate this right to his attorney. But giving it currency and incorporating this condition in every marriage contract is absolutely against the objectives of Islam.

The proportion of rights and powers between male and female, as laid down by Islam, naturally demands that out of the two parties only the former should be entitled to pronounce divorce. It has cast the burden of dower, the expenses of maintenance during the post-divorce period (*'iddah*) and expenses involving the fostering and custody of small children entirely on the male. Therefore, a man is bound to exercise caution in the use of the right of divorce, for he alone shall have to bear the entire financial burden. On the other hand, Islam has not imposed any monetary burden on the female. Rather, in consequence of divorce, she stands to get something and has to lose nothing. She is, therefore, likely to become extremely reckless in the matter of divorce, and may unhesitatingly pronounce divorce on the slightest provocation. On these grounds the transference of this right to women would be absolutely repugnant to the scheme of things envisaged by Islam in regard to matrimonial life. If this wrong practice were to be given currency in the society, it would be followed by very grave consequences and we shall be confronted with a large-scale epidemic of divorces from which our society has hitherto remained immune.

Q. No. 8. What steps should be taken to prevent the sale of daughters in certain classes, and the receipt of money by the parents or guardians ?

Ans. It is a most reprehensible practice. It should be declared a cognizable offence and those who indulge in the sale of their daughters should either be punished in the form of imprisonment or fine.

Q. No. 9. Should a standard *Nikah nama* be prescribed and its execution made compulsory at the time of the solemnisation of the *Nikah* ?

Ans. It is quite appropriate. The form of *Nikāḥ-nāma* (marriage form) should be compiled with the help and advice of proficient jurists, which should also have the necessary injunctions of matrimonial law appended therewith. Ignorance of these often leads people to commit many n mistake.

DIVORCE BY THE HUSBAND

Q. No. 1. If a husband pronounces *talaq* three times at a single sitting, should it be recognised as a valid and final divorce or should three pronouncements during three *tuhrs*, as enjoined by the Holy Qur'an, be made obligatory ?

Ans. The four Imams and majority of the jurists are of opinion that if three divorces are pronounced at one and the same time they will be reckoned as three. To me this is the more correct view. As such I cannot suggest any alteration on this point. But it is an admitted fact that, although legally valid, it is still a sin as it goes contrary to the method of divorce taught by God and His Prophet (peace be on him). Hence there must needs be a check on this wrong practice. In my opinion, the following devices would be appropriate :

(*a*) The proper method of divorce should be made known to Muslims in general. Its inherent soundness and advantages should be explained to them As against this, they should be apprised of the disadvantages which accrue from the wrong method of divorce. It should also be made known to them that resort to this wrong method of divorce is an act of sin. This should also be included in the syllabus of studies and hammered into the minds of the people through Press and Radio, and also mentioned in the injunctions appended to the *Nikāḥ-nāmas* (marriage forms).

(*b*) The stamp writers should be legally forbidden to write documents of three divorces (at a time) and the defaulters should be penalised.

(*c*) Pronouncers of three divorces at a time should also be penalised. For this we have got a precedent of Caliph 'Umar (may God bless him . Whenever a case of divorce effected thrice in a sitting was brought to him, he would enforce it, but at the same time punish the person who resorted to it.

Q. No. 2. Should there be compulsory registration of divorces ?

Ans. Arrangements for the registration of divorces should of course be made, but it should be discretionary. There are many difficulties in making it compulsory. Any divorce about which there is proper evidence or which is admitted by the divorcer has got to be recognised by the court as such irrespective of the fact whether it has or has not been registered.

Q. No. 3. What should be the penalty for non-registration ?

Ans. There is no need of imposing any penalty for non-registration.

Q. No. 4. Should conciliation committees be appointed for different areas and no divorce be recognised as valid till the parties have applied to the conciliation committee which should

co-opt one member of the husband's family and one member of the wife's family ?

Ans. Conciliation committees should of course be constituted and it should also be laid down for the courts that, before issuing decrees on family disputes, the system of arbitration, as prescribed by the Qur'ān, should be tried for bringing about reconciliation. It would, however, be wrong to provide that a divorce which has not been referred to the conciliation committee or to family arbiters should not be recognised as valid. According to the *Sharī'ah*, every divorce which fulfils the requisites of a divorce becomes effective. The *Sharī'ah* has not prescribed reference to any arbiter or conciliation committee as a condition for making a divorce effective. Now, if the courts refuse to recognise such divorces, in spite of their being valid according to the *Sharī'ah*, people will be faced with a very complicated situation and this enactment will lead to a conflict between the *Sharī'ah* and the law of the land.

Q. No. 5. Should it be open to a Matrimonial and Family Laws Court, when approached, to lay down that a husband shall pay maintenance to the divorced wife for life or till her marriage ?

Ans. It will be against the *Sharī'ah* as well as against the accepted canons of justice. All sorts of cases where a divorced wife is entitled to receive maintenance from her divorcing husband have been specified in the Qur'ān and Ḥadīth, and the period for which she is entitled to it in various cases has also been laid down. Title to a life-long maintenance or till re-marriage will go against the code of the *Sharī'ah*. Moreover, it seems quite unreasonable that a person who has divorced a woman and is no more entitled to have any rights over her should be compelled to bear the burden of her expenses for the whole of her life or till her re-marriage. It will also tend to lower the moral prestige of women themselves. I cannot understand how any self-respecting woman can ever tolerate her financial dependence on a person who is no longer her husband. By incorporating such procedure in our code of law, ew shall be only humiliating the position of our women-folk. It will be advantageous only to those few women for whom money carries greater weight than their moral prestige and self-respect.

DIVORCE SOUGHT BY THE WIFE

Q. No. 1. Do you regard the provisions of the Dissolution of Muslim Marriages Act, 1939, satisfactory or would you enlarge or amend them in any particular ?

Ans. The Act in question is not before me and as such I cannot express my views thereon. It would have been better if a copy of the Act had been appended to the Questionnaire.

Q. No. 2. Would you embody the *khula'* form of *talaq* in a legislative enactment to make it more certain and precise ?

Ans. It is advisable that Islamic injunctions not only in regard to *Khula'*, but also in regard to all matters connected with conjugal life should be codified. For this purpose a committee consisting of *'Ulama* and experienced lawyers should be constituted.

POLYGAMY

Q. No. 1. The Qur'anic verse dealing with polygamy occurs only in connection with the protection of the rights of orphans (Verse II, Surat An-Nisa). Is polygamy prohibited except when the protection of the rights of the orphans is the main objective ?

Ans. It is wrong to think that the above verse of the Holy Qur'ān is inalienably linked with the protection of the rights of orphans and that polygamy is prohibited except in cases where the protection of the rights of orphans is involved. The Holy Qur'ān abounds in the explanation of circumstances in which a verse is revealed, the factors which may demand and necessitate it or the historical context with which it is related. This cannot, however, lead anybody, much less anybody conversant with law, to deduce that these injunctions are inalienably linked with that particular context only and that their enforcement or availing of that permission is prohibited in all but that particular circumstance. For example, verse 283 of Sūrah al-Baqarah states :

'If ye be on a journey and cannot find a scribe, then let there be a pledge with possession.'

Can anybody, who has even an iota of legal understanding, say that the permissibility of 'pledge in possession' is conditioned with travelling and with the non-availability of anybody to write

out the document? Similarly, verse 23 of Sūrah an-Nisā' which deals with the prohibition of marriage with certain close female relatives provides for the prohibition of marriage with step-daughters in the following words:

'Forbidden to you are yours mothers, and your daughters, and your sisters, and your paternal aunts, and your maternal aunts, and the daughters of a brother, and the daughters of a sister, and the mothers who have given you suck, and your foster sisters, and the mothers of your wives, *and your step-daughters, who are being brought up under your care, from wives* with whom you had intercourse . . . .'

Can these words be taken to mean that the prohibition of marriage with step-daughters is conditioned with their protection by the step-father and, if this has not been the case, then the marriage would be permissible?

These examples should be sufficient to drive home the truth that mentioning the protection of the rights of orphans in the same verse which permits polygamy does not subject this permission to the condition of protecting the rights of orphans only. A glance at the conditions under which these verses were revealed would make the position crystal clear. Polygamy was current in Arabia even before the revelation of this verse. The Prophet (peace be on him) also had a number of wives and similar was the case with quite a number of his Companions. The very fact that the Qur'ān did not prohibit it was enough to indicate its permissibility. This verse was, therefore, not revealed to express the permissibility of this institution. Revealed after the war of Uḥad when many Muslims were confronted with the problem of the upbringing of orphans due to the martyrdom of a good number of Muslims, it aimed at making them feel that they need not worry about the matter and that it was easy of solution by resort to polygamy which was permissible even from before. *Thus this verse did not indicate any new permission; it simply pointed out that a particular current practice, which was permissible, should be resorted to for the solution of this specific social problem.* What was new in the verse was that hitherto there had been no restriction on the number of wives. Now it was restricted to four. Nobody who has this background in mind can fall a prey to the misunderstanding that it was for the first time that polygamy was permitted through this verse or that it was conditioned with circumstances

which may demand a resort to it for the purpose of rotecting the rights of orphans.

Q. No. 2. Should it be made obligatory on a person who intends to marry a second wife in the life-time of the first to obtain an order to that effect from a court of law?

Ans. The *Sharī'ah* has made no difference between the first, second, third and fourth marriages. It equally allows all of them. If the first marriage requires no order from a court of law, even the third and the fourth, what to say of the second marriage, should not be conditioned with the procurement of any court order. Suggestions like these can be considered only on the presumption that polygamy is inherently an evil and that, if it cannot be abolished altogether, it must be checked by legal restrictions. This is the view of Roman Law, not of the Islamic Law. Hence it is fundamentally erroneous to drag in such proposals which militate against the basic concepts of Islam when matters are being discussed in the light of Islamic jurisprudence.

Q. No. 3. Should it be laid down that no court can grant such an order till it is satisfied that the applicant can support both wives and his children in the standard of living to which he and his family have been accustomed?

Ans. The reply to Question 2 above makes the question superfluous. However, it seems pertinent to point out a few weaknesses inherent in the suggestion. The suggestion is that the court should allow second marriage only when the husband satisfies the court that he can support both the wives and the children from them. But the question is: *Why should not this condition be attached with the first marriage too—the condition that prior to marriage a person must necessarily obtain an order from the court after satisfying it in respect of the soundness of his financial position?*

Moreover, how queer it is that leaving aside all other considerations, say those of affection and love, of the bliss of matrimonial relationship and of the peace, poise and happiness of family life, the only question that has been given any weight is that of satisfying the court in respect of one's financial ability to support the wives and their children. *The necessary consequence of this will be that polygamy will become a forbidden tree for people of middle and lower strata of the society, while its doors will remain wide open for the wealthy people.* Another weakness of the proposed

measure is that the court will be required to allow second marriage after satisfying itself in regard to the ability of the husband to support his wives and children, although the mere fact of his *being able to support does not ensure that a person will actually continue to support his wives*. There are innumerable instances of people with handsome incomes callously neglecting one of their wives. How can the proposed restriction remedy this evil?

Instead of adopting such crude measures, will it not be better for us to feel contented with the provisions of the *Sharī'ah* which keeps a man free to exercise his discretion in the matter of subsequent marriages and provide legal redress for the grievances of the wives?

Q. No. 4. Should it be laid down that the court shall make provision that at least one-half of the salary of such an individual is paid directly to the first wife and her children?

Q. No. 5. In the case of persons who do not enjoy a direct salary, should the court demand guarantees from the applicant for the payment of at least half his income to the first wife and her children?

Ans. This proposal is absolutely wrong. A person is not necessarily responsible for the financial support only of his wife and children. There are one's parents, younger brothers and sisters and other deserving relatives needing support. Under such circumstances, the regulation that one-half of the salary of a person must go to the first wife and her children would be a monstrous injustice. Now, if the first wife has no child and the second one has, how can it be fair to give away one-half of the salary to the childless wife and leave the remaining half for the wife who has children? As against these fantastic regulations, the *Sharī'ah* provides that the husband should himself be fair in treating his wives and if any wife complains of injustice, the court, keeping the circumstances of the family in view, should devise a course based on justice and equity.

MEHR

Q. No. 1. Should it be enacted that the *Mehr* fixed in the marriage contract shall be payable howsoever high it may be?

Ans. According to the *Sharī'ah*, the *Mehr* is something which

is meant to be paid. What is the need of making any enactment for this purpose?

In case the enactment is intended to provide that in all cases and circumstances the entire amount of *Mehr* has got to be paid, then it is contrary to the Qur'ān as well as to reason and justice. The Qur'ān does allow women to forgo *Mehr* altogether or to reduce it. Moreover, if the amount fixed as *Mehr* is too exhorbitant for a husband or at any stage later on his financial condition deteriorates to such an extent that he becomes incapable of paying this huge amount—an amount which, although agreed to once, is generally held to be quite unreasonable—the court or the *elders* of the family should not be denied the opportunity to endeavour to get the two parties agree to a reasonable amount of *Mehr*.

Q. No. 2. Do you approve that there should be no peirod of limitation in a suit for *Mehr*?

Ans. Fixation or non-fixation of the period within which the *Mehr* should be paid depends upon the mutual agreement of the parties. The law need not interfere in this matter. There is no need of any such provision on the statute book and if any such provision does exist, it should be repealed.

Q. No. 3. Are you of the opinion that if there is no specification in the *Nikah-nama* concerning the time of payment of *Mehr*, then half of it should be regarded as *Mu'ajjal* (payable on demand) and the other half as *Mu'wajjal* (deferred) payable on the dissolution of marriage either by death of the husband or by divorce?

Ans. In this case the whole *Mehr* is payable on demand. If, however, the court, keeping the circumstances of the husband in view, finds that the *Mehr* is actually too heavy, it can suggest some suitable means for the payment of *Mehr*. It would be wrong to tie down the courts by legislative measurers in this behalf.

CUSTODY

Q. No. 1. At present the mother is entitled to the custody of her minor children only up to a certain age, i.e. the male child up to 7 years and the female child till she attains puberty. These limits have no authority either in the Holy Qur'an or Hadith,

but have been fixed as the result of opinions of some Muslim jurists. Do you consider it admissible to propose some modifications ?

Ans. The important thing to be remembered in this behalf is that the interests of children take precedence over everything else. While preferring father to mother or *vice versa*, full consideration should be given to the prospects of the child's education and proper upbringing. It would be inappropriate to enact a law in favour of one of the two. What requires to be enacted is that whosoever the custodian, the father or the mother, no restrictions should be placed on children meeting the other party. Among noted jurists 'Allama Ibn Taymiyya and Ibn Qayyim hold this view.

MAINTENANCE OF WIFE AND CHILDREN

Q. No. 1. Are you in favour of enacting that if the husband neglects or refuses to maintain his wife without any lawful cause, the wife shall be entitled to sue him for maintenance in a special Matrimonial and Family Laws Court ?

Ans. Yes.

Q. No. 2. Under section 488 of the present Code of Criminal Procedure, the wife can apply to a Criminal Court for maintenance. Criminal Courts can pass an order for maintenance not exceeding a monthly allowance of Rs. 100. Are you in favour of increasing the limit permissible under the Criminal Law ?

Ans. Yes, the court should be entitled to pass orders for the maintenance of the wife according to the position of the couple. Fixation of any particular amount by law would not be proper.

Q. No. 3. Would you be in favour of the proposal that a wife should be allowed to claim past maintenance not exceeding three years ?

Ans. Fixing the limit of three years is not correct. The husband should be made to pay the maintenance for the period he has kept the wife deprived of it.

Q. No. 4. Do you consider that if there is a stipulation in the *Nikah-nama*, the wife shall be entitled to claim maintenance for the stipulated period and not only for the period of *'Iddat* ?

Ans. It happens so often that at the time of marriage many unreasonable stipulations are accepted to the pressure of society and family or out of regard and courtesy. Such stipulations should not be encouraged. If the *Nikāḥ-nāma* contains stipulations entitling the wife to rights in respect of maintenance beyond the permissible limits, such stipulations should not be enforceable by law.

GUARDIANSHIP OF PROPERTY

Q. No. 1. Do you agree that in the absence of the father the court should appoint the mother as guardian of the property of her children, unless such appointment is considered detrimental to the welfare of the minor and the protection of the property ?

Ans. This should be done when the protection of the interests of children necessitates mother's appointment as a guardian, e.g. in case there is no male member of the family who may be appointed as the guardian of their property or if any such male member is there it is apprehended that his guardianship will jeopardise the interests of the children.

Q. No. 2. Would you legislate that the guardian of the property of the minor shall have no power to sell or mortgage the property of the minor without the previous permission of the court ?

Ans. The proposal is quite appropriate.

INHERITANCE AND WILLS

Q. No. 1. Would you suggest that if there are any parts of Pakistan where the Shari'at Laws of inheritance do not prevail, immediate steps be taken to enact such legislation ?

Q. No. 2. In view of the complexity of Procedural Laws, would you be in favour of the proposal that whenever a woman is a plaintiff in respect of her rights of inheritance the ordinary Civil Court shall transfer such suits to the Matrimonial and Family Laws Courts for expeditious disposal ?

Ans. Both these proposals are quite sound.

Q. No. 3. Is there any sanction in the Holy Qur'an or any authoritative Hadith whereby the children of a pre-deceased son

or daughter are excluded from inheriting property ?

Ans. This is a natural corollary of the fundamental principles of the distribution of inheritance as contained in the Holy Qur'ān and Ḥadīth The argument in favour of it is that investing the children of pre-deceased sons or daughters with the right to inherit property would upset the entire structure of inheritance which is based on the fundamental principles of the Qur'ān and *Sunnah*. This is the reason why Muslim jurists have been unanimous on the point from the very beginning. Since a full elucidation of the question is not possible here, I would recommend a perusal of the pamphlet *The Question of the Inheritance of Grandsons*[1] (pp. 9-40).

Q. No. 4. Is it permissible to legislate that a Muslim may transfer property to anyone for life with the provision that thereafter the property shall revert to his own heirs ?

Ans. In Islamic jurisprudence there is a term *'Umra* for this purpose and there is a difference of opinion among jurists on the point. Imam Abū Ḥanīfa, Imam Shāfi'ī and Imam Aḥmad ibn Ḥanbal are of the view that if the property has been transferred in this manner, it cannot return either to that person himself or to his heirs in spite of the incorporation of a clear stipulation in the transfer document to the effect. On the contrary, Imam Mālik holds the view that if the property has been transferred for life it will automatically revert to the person who transferred the property or to his heirs after his death except in case it had been specified that the property had been transferred to the said person and his successors.

Most of the *Aḥādīth* go to support the former view and, if the matter is closely and deeply examined, the correctness of that standpoint would become obvious. If a person knows that the property will revert to the erstwhile owner at his death, he, in his old age, would give up taking interest in its maintenance. His heirs too would take no interest in it, for they know that they are not to inherit it. It would result in sheer wastage of the property and cause resentment to the real owner too when he receives the property in a neglected, and therefore ruined, condition. That is why the *Sharī'ah* stipulates that the transference should be absolute. It is better not to transfer at all than to transfer for one's

1. The pamphlet has been published by Islamic Publications, Ltd., Lahore.—*Editor.*

life-time only.

This follows from the following Ḥadīth :

'Keep your belongings with yourselves and don't destroy them. If anybody gives something to someone for the life-time it means that the thing becomes his (the receiver's) property to remain with him during his life and be, on his demise, transferred to his heirs.' — (Related in *Muslim* and *Aḥmad.*)

Q. No. 5. Do you consider that the *Waqf 'alal-Aulad* Act, 1931, should be amended and improved to enable the property to be sold or exchanged or dealt with otherwise to improve its value or use by permission of the Court ?

Ans. It is better to repeal this Act altogether. It creates a host of complications and the Islamic *Sharī'ah* does not provide any firm basis for it.

DISSOLUTION OF MARRIAGE BY COURT

Q. No 1. Should the grounds mentioned in section 2 of the Dissolution of Muslim Marriages Act be enlarged, restricted or amended in any manner ?

Ans. As the original Act is not before me, I am not in a position to answer this question.

. No. 2. Should it be enacted that, if a woman wants dissolution of marriage and in the opinion of the Court the fault lies with the husband, a divorce may be allowed without requiring the wife to part with *Mehr* or anything else which she may have received from the husband ?

Ans. There is a provision for this in the Islamic law of *Khula'* and I endorse this proposition. I would, however, add that the Islamic concept of the 'fault of the husband' should be strictly adhered to and the Western conception of 'fault' should not be allowed to influence the issue.

Q. No. 3. Would you make incompatibility of temperament a valid ground for divorce ?

Ans. In case of incompatibility of temperament the court should first resort to the Qur'ānic rule of 'Family Arbiters' so that two responsible members of the family may try their level best to eliminate the differences. In case they report their failure to the court, the court should step in and, instead of investigating the causes of the tussle, it should only ascertain whether or not it

has become totally impossible for the couple to live together. In that case, if the woman herself seeks for separation, the court should affect the *Khula'* and, if not, the court should compel the husband to give divorce. He must not be allowed to keep the issue undecided and thus keep the wife's fate hanging in the balance.

Q. No. 4. Should the period of seven years' imprisonment mentioned in clause 3 of section 2 of the Dissolution of Muslim Marriages Act be reduced to four years ?

Ans. In cases of long-term imprisonment dissolution of the marriage is not an appropriate measure. Even if the right to seek dissolution in such cases is given to the woman, it cannot solve the problem as such. It is out of tune with the temper of our society. A woman, who is the custodian of the home and also has children, can never even think of such separation. In these circumstances, even if the law is amended, it will not ameliorate the condition of a huge majority of women, for they would never avail of it. I think that this problem can be solved, not by resort to this amendment, but by bringing about the following changes in the rules and regulations of prisons :

(*a*) Persons who are sentenced to imprisonment for four years or less should be allowed, at least twice in a year, to visit their homes on parole, for at least fifteen days.

(*b*) Those who have to undergo imprisonment for more than four years should not be kept in prison. Instead there should be separate colonies for such long-term prisoners and they should be allowed to keep their families there.

(*c*) Prisoners should be paid according to the current market rate for the work they have to do in prisons. This amount should be credited to their accounts and the entire amount or a reasonable portion thereof should be given to their families for their maintenance.

MATRIMONIAL AND FAMILY LAWS COURTS

Q. No. 1. Would you be in favour of a proposal that a person of the rank of District and Sessions Judge be appointed in each Commissioner's Division to deal with cases relating to family and marriage laws ?

Q. No. 2. Would you be in favour of a proposal that all matrimonial cases and all other cases relating to Family Laws, where a woman is a plaintiff, shall be cognisable only by the Matrimonial and Family Laws Courts ?

Q. No. 3. Are you in favour of the proposal that the procedure of the Matrimonial and Family Laws Court should not be that laid down in the Civil or Criminal Procedure Code, and that special procedure should be laid down for such Courts by a legislative enactment ensuring that every case shall be decided finally within a period of three months in the original court ?

Q. No. 4. Are you in favour of the proposal that no court fee or other charges shall be payable in the Matrimonial and Family Laws Courts ?

Q. No. 5. Are you in favour of the proposal that it shall be open to the parties to be represented by agents or relations and not necessarily by legal practitioners ?

Q. No. 6. Are you in favour of the proposal that at least one male and one female assessor shall be associated with the judge as advisers in such courts ?

Q. No. 7. Are you in favour of the proposal that the Divisional Matrimonial and Family Laws Court shall hold its session in each district headquarter by turn ?

Q. No. 8. Are you in favour of allowing only one right of appeal to the parties concerned ?

Q. No. 9. Are you in favour of the proposal that the appeal shall lie directly to the High Court, and that it should be enacted that it must be finally decided within three months ?

Ans. All the above proposals are quite appropriate.

Q. No. 10. What provisions whould you make for the realisation of money payable under the orders of the Matrimonial and Family Laws Courts and the enforcement of any other orders of these courts ?

Ans. It should adopt the same methods which are adopted by regular courts in respect of the enforcement of their dicisions and for the recovery of government dues.

Q. No. 11. What provision, if any, would you make for defraying the miscellaneous expenses of litigation in such cases ?

Ans. In this respect I feel that the party which is proved to be the aggressor and who has wasted the time of the court and of the other party should bear the burden of the expenses, a

portion of which should be given to the other party and the rest may go to meet the expenses of the court. Moreover, extra stamp duty can be levied on exceptionally high amounts of *Mehr* and the petition should be accepted only after this duty has been paid. These proposals will also go a long way towards reforming the society in general.

The amounts procured in the above-mentioned way will cover a substantial portion of court's expenses. The rest should be met from government treasury.

Chapter 3

REPORT OF THE COMMISSION ON MARRIAGE AND FAMILY LAWS

By

MR. JUSTICE MIAN ABDUR RASHID

In the following pages the text of the 'Report of the Commission on Marriage and Family Laws,' published vide Gazette Extraordinary of the Government of Pakistan dated 20, June 1956, is being reproduced with a view to furnishing the reader with the viewpoint of the authors of the Report and their approach to the problems involved. This, we hope, will enable the reader to have direct acquaintance with both the sides of the picture and to formulate his own opinion in view of the merits and demerits of the two.—*Editor.*

Introduction.

On the 4th of August, 1955, the Government of Pakistan announced the formation of a seven-member Commission on Marriage and Family Laws, consisting of the following persons:—

1. Dr. Khalifa Shuja-ud-Din — *President.*
2. Dr. Khalifa Abdul Hakim — *Member-Secretary.*
3. Maulana Ehtishamul-Haq.
4. Mr. Enayat-ur-Rehman.
5. Begum Shah Nawaz.
6. Begum Anwar G. Ahmad.
7. Begum Shamsunnihar Mahmood.

The terms of reference were as follows :—

Do the existing laws governing marriage, divorce, maintenance and other ancillary matters among Muslims require modification in order to give women their proper place in society according to the fundamentals of Islam ? The Commission was asked to report on the proper registration of marriages and divorces, the right to divorce exercisable by either partner through a court or by other judicial means, maintenance and the establishment of Special Courts to deal expeditiously with cases affecting women's rights.

The first meeting of the Commission was held on the 5th October, 1955. This meeting dealt mainly with the procedure to be followed. Its principal recommendation was the preparation of a Questionnaire, by the Secretary, to be framed in the light of the terms of reference. Shortly after this meeting the President of the Commission Dr. Khalifa Shuja-ud-Din unfortunately died suddenly of heart failure, and the Commission was stranded for lack of a President. The Ministry of Law took some time to select a President of wide legal and judicial experience. The Commission was happy to learn that the former Chief Justice of Pakistan, Mian Abdul Rashid, had been approached and willingly consented to act as the President. His appointment was formally announced on the 27th October, 1955, and the second meeting of the Commission was held on the 30th November. The new President was of the opinion that framing of a comprehensive Questionnaire was a vital initial step and that this heavy responsibility could not be placed on the shoulders of the Secretary only. He placed his view before the members of the Commission and they agreed to

frame the Questionnaire after a thorough discussion. The Questionnaire, as it emerged from the deliberations of the Commission, was printed both in Urdu and English, originally three thousand copies were printed and distributed. The dissemination of the Questionnaire in East Pakistan and the translation into Bengali were entrusted to Begum Shamsunnihar Mahmood. It was also published in the Press, and the public was urged to realize the importance of the issues and assist the Commission with their knowledge and experience. The final date for the receipt of the answers was fixed as the 15th of January, 1956, which provided a period of more than a month to think out the problems at ease. The initial response, however, was unexpectedly disappointing. The public then demanded a still wider circulation of the Questionnaire and the extension of the date fixed for answers. In response to this demand thousands of additional copies were printed and sent to any person who demanded them. The final date for answers was extended till the 15th February. After this the answers began to pour in by dozens every day and many persons whose opinion carries great weight answered the questions in detail, giving reasons and authorities. We are grateful to all the persons and organisations that have taken the trouble to study and answer our Questionnaire. The answers given are various and difficult to classify or tabulate, but a careful investigation has made it possible to assess the general trends. The members of the Commission have exercised their individual judgment, but have given careful consideration to the opinions of learned, liberal and enlightened persons.

The origin of the Commission.

We shall state briefly the reasons for the formation of this Commission. It is an indisputable article of Muslim creed professed by every Muslim that so far as the basic principles and fundamental attitudes are concerned Islamic teaching is comprehensive and all-embracing, and Islamic law either actually derives or should derive its principles and sanctions from divine authority as revealed in the Holy *Qur'ān* or clear injunctions based on the *Sunnah*. It is this belief which has been affirmed in the Objectives Resolution and the Constitution of Pakistan. It might be objected that if a well defined code about Marriage and Family Laws already existed, where was the necessity of appointing

a Commission for the purpose of any revision or modification? This question can be easily answered both by reference to the history of Muslim jurisprudence and the present-day circumstances. So for as the Holy Book is concerned the laws and injunctions promulgated therein deal mostly with basic principles and vital problems and consist of answers to the questions that arose while the Book was being revealed. The entire set of injunctions in the Holy *Qur'ān* covers only a few pages. It was the privilege of the Holy Prophet to explain, clarify, amplify and adapt the basic principles to the changing circumstances and the occasions that arose during his life-time. His precepts, his example and his interpretation or amplification constitute what is called *Sunnah*. As nobody can comprehend the infinite variety of human relations for all occasions and for all epochs, the Prophet of Islam left a very large sphere free for legislative enactments and judicial decisions even for his contemporaries who had the Holy *Qur'ān* and the *Sunnah* before their eyes. This is the principle of *Ijtihad* or interpretative intelligence working within the broad framework of the *Qur'ān* and the *Sunnah*.

Ijtihad.

Although there was primitive simplicity in the life of Arabia during the time of the Holy Prophet, his prophetic wisdom was conscious of the fact that there may be situations and problems not clearly envisaged in the *Qur'ān*, and that in such cases the *Qur'ān* could only lay down basic principles which could offer light and guidance even in unpredictable circumstances. He knew that his own explanations and amplifications too could not be expected to cover all details or compass the novelty of situations and circumstances. He enjoined on his companions, to whom important duties were entrusted, to exercise their own rational judgment with a pure conscience if the Holy *Qur'ān* and the *Sunnah* did not provide any precise guidance in any particular situation.

The great *Khalifas* and others endowed with wisdom and imbued with the spirit of Islam exercised *Ijtihad* when the Muslim State and Society were developing. This is what Iqbal, the great Philosopher and revivalist of Islam, calls the dynamic principle which, according to him, is a distinguishing characteristic of Islam.

"The word (*Ijtihad*) literally means to exert. In the terminology of Islamic law it means to exert with a view to form an independent judgment on a legal question. The idea, I believe, has its origin in a well-known verse of the *Qur'ān*—'And to those who exert We show Our path.' We find it more definitely outlined in a tradition of the Holy Prophet. When Ma'adh was appointed ruler of Yemen, the Prophet is reported to have asked him as to how he would decide matters coming up before him. 'I will judge matters according to the Book of God,' said Ma'adh. 'But if the Book of God contains nothing to guide you?' 'Then I will act on the precedents of the Prophet of God.' 'But if the precedents fail?' 'Then I will exert to form my own judgment.' The student of the history of Islam, however, is well aware that with the political expansion of Islam systematic legal thought became an absolute necessity, and our early doctors of law, both of Arabian and non-Arabian descent, worked ceaselessly until all the accumulated wealth of legal thought found a final expression in our recognised schools of law. These schools of law recognize three degrees of *Ijtihad*: (1) complete authority in legislation which is practically confined to the founders of schools, (2) relative authority which is to be exercised within the limits of a particular school, and (3) special authority which relates to the determining of the law applicable to a particular case left undetermined by the founders. In this paper I am concerned with the first degree of *Ijtihad* only, *i.e.*, complete authority in legislation. The theoretical possibility of this degree of *Ijtihad* is admitted by the *Sunnis*, but in practice it has always been denied ever since the establishment of the schools, inasmuch as the idea of complete *Ijtihad* is hedged round by conditions which are well-nigh impossible of realization in a single individual. Such an attitude seems exceedingly strange in a system of law based mainly on the ground-work provided by the *Qur'ān* which embodies an essentially dynamic outlook in life. It is therefore, necessary to discuss causes of this intellectual attitude which has reduced the law of Islam practically to a state of immobility." Iqbal's: The Reconstruction of Religious Thought in Islam, pp. 148-149.

Passive Acceptance.

This attitude of passive acceptance and rigid *Taqleed* or unquestioned following of the previously established authority of a great jurist *Imam* is explicable by reference to historical circumstances. In the history of human thought and institutions towering thinkers are always followed by epigones or mere commentators for centuries or even millenniums. For the stagnation of Muslim jurisprudence there were also political reasons. At

the end of the creative Abbaside period the centres of Muslim civilization were invaded and destroyed by Tartar barbarians. Libraries and centres of learning were devastated; creative and progressive thinking became impossible. In order to save the structure of Muslim law, it was deemed expedient to stop the activities of second rate innovators who could only make cultural confusion still further confounded. After this Muslim civilization became stagnant and dormant and remained so till the awakening and stirring in the middle of the nineteenth century. Islam became identified with rigid orthodoxy in the matter of law, and the Western world which was recasting its life in the light of progressing knowledge and adapting itself to changing circumstances began to accuse Islam itself, dubbing it as an outworn creed incapable of adaptation to changing circumstances. The Muslim authoritarians and *Muqalladeen* forgot that the Book of Allah had enjoined on them to exercise their judgment and the Prophet of God too had inculcated it emphatically اجتهد وا وكل ميسر لما خلق Exercise *Ijtihad*; Allah makes it easy for those who are endowed with it. There is another authentic and illuminating Hadith اذا حكم الحاكم فاجتهد ثم اصاب فله اجران و اذا حكم فاجتهد ثم اخطاء فله اجر۔

"When a judge or a ruler exercises *Ijtihad* and his judgment is correct Allah grants him a double reward; but when in his *Ijtihad* he commits a mistake even then Allah rewards him with a single reward."

The savant jurists and judges are thereby encouraged to exercise their judgment according to their light in spite of the risk of error because life can improve only by freedom of judgment. Muslim scholars are called in a Hadith the successors of the prophets, and it is accepted by all Muslims that every prophet was a *Mujtahid* who changed rules and regulations and legislated for the needs of his society العلماء متاء متى [sic]

People with knowledge are the trustees of my *Ummat*.

العلماء مصابيح الارض و خلفاء الانبياء و ورثتى و ورثه الانبياء

Men of knowledge are the lights of the earth and successors of the prophets; they are the recipients of my heritage and the heritage of other prophets.

Hazrat Umar saw that even a common woman sometimes gave a better judgment than he himself, if she speaks from

knowledge she is exercising a right granted to her by Islam.

None of the great jurists and *Imams* considered themselves to be infallible, nor did their disciples hesitate to differ from them. The differences between Imam Abu Hanifa and his two renowned disciples Imam Abu Yousaf and Muhammed are well-known. Ma'an ibn-i-Isa has related about Imam Malik that he said, 'I am a human being; sometimes I am right and at other times I am wrong; test my judgments on the Book of Allah or *Sunnah*, and if they are not in conformity with them throw them away.' The great Imam Ahmad-ibn-e Hambal said 'do not follow me or Malik or Alshafaie or Sauri and exercise your judgment to draw conclusions from the sources from which they drew them. The *Shiahs* emphasize the propriety and necessity of *Ijtihad* even more than the *Sunnis* and grant a great latitude to their *Mujtahids*.

Early centuries of Islam.

The early centuries of Islam were dynamic, creative and formative. This epoch brought forth eminent jurists who have been revered as *Imams* for more than a millennium and whose codes form a considerable portion of Muslim law and jurisprudence even to the present day. But Muslim society expanded, and became considerably complicated in its social, economic, legal and political relations. New occasions, unforeseen at the time of the Prophet, required new enactments and rulings based on liberal interpretations, analogy, equity and common weal. This task was performed admirably according to their light by these revered jurists. But it was inevitable that they could not always be in agreement. They differed among themselves in minor details and sometimes on major and vital issues. Their own disciples did not hesitate to differ from their masters, but none of them wanted to step beyond the broad frame-work of the *Qur'ān* and the *Sunnah*. If Muslim State and Society had not become dormant and stagnant due to monarchical and feudal influences and owing to the apathy of the custodians of the law, this process would have continued indefinitely, rejuvenating Muslim Society from time to time.

We cannot go into the causes that led to this stagnation, but a very unfortunate consequence of the worship of the letter, and undue reverence of the past, was that it became almost

an article of faith with the large majority of the learned and the unlearned that the days of creative and adaptive legislation were over and the door of *Ijtihad* was closed after the fourth century of the Islamic era.

There is no denying the fact that Muslims all over the world, during the last three centuries particularly, were left behind in the rapidly accelerating race of social, political, economic and cultural advancement. One major cause of this universal backwardness is the unwillingness of Muslim peoples to appreciate the significance of changing realities and the influx of new and undreamt of factors. The attitude of the employer to the employee, of the land-lord to the tenant, of capital to labour and of man to woman has changed and is changing beyond recognition. These changes require a modern approach, new rules of conduct, and fresh legislation in almost all spheres of life and a radical remodelling of the legal and judicial system. No nation can stand aside as an idle or wondering on-looker while the world progresses rapidly. No nation, big or small can now stand in indifferent isolation. At the present time one has either to steer one's boat with skill and firmness towards a definite goal, or as an alternative merely to drift or be engulfed by a rapidly flowing stream.

Islam, a progressive religion.

No Muslim can believe that Islam is an outworn creed incapable of meeting the challenge of evolutionary forces. Its basic principles of justice and equity, its urge for universal knowledge, its acceptance of life in all its aspects, its world-view, its view of human relations and human destiny, and its demand for an all-round and harmonious development, stand firmly like a rock in the tempestuous sea of life.

Islam is not a priest-dominated theocracy.

Many a nation of the West, after centuries of bitter conflict between the Church and the State resorted to Secularism having despaired of divine guidance in the matter of law. Islam was never theocratic in the sense in which this term is used in the history of Western politics. For Islam life is an indivisible unity in which the spiritual and the mundane are not sundered. Religion, according to Islam, means life in the world lived with a spiritual attitude which sublimates all that it touches. For this

very reason Islam never developed a Church with ordained priests as a class separate from the laity. According to the Holy *Qur'ān* the demands of God and the demands of Caesar are not to be satisfied separately because of mutual contradictions and conflicts as Islam recognises no Caesars. As it countenances no kings who can do no wrong and who stand above the law, so it recognizes no priests. Some may be more learned in Muslim law than others, but that does not constitute them as a separate class; they are not vested with any special authority and enjoy no special privileges.

Birth of Pakistan.

Pakisian was carved out of the Indian sub-continent by leaders of Muslim thought beginning with Sayyed Ahmad Khan and culminating in the person of Quaid-e-Azam Muhammed Ali Jinnah. Islamic ideology was expounded by Iqbal, with the firm conviction that Islam, properly understood and rationally interpreted, is not only capable of moving along with the progressive and evolutionary forces of life, but also of directing them into new and healthy channels in every epoch. The creation of Pakistan was a revolutionary step, and all revolutions demand primarily remoulding of the educational system and the recasting of laws and the judicial system to fulfil the aspirations of a free and expanding life. But Pakistan, at its very inception, was faced with problems of sheer existence and self-preservation. Ugly situations created by the hostility of neighbours and economic chaos, for which Pakistan was not responsible, made the country concentrate its energies on problems of sheer subsistence, leaving little mental or material resources for educational reconstruction and legal and judicial reform. The work of legal and judicial reform requires intensive and extensive efforts over a period of time, and can be undertaken fruitfully only by a team of scholars and legal experts who possess a vast experience in the legal field, are conversant with Muslim law and jurisprudence and are progressive enough to believe that reconstruction and fresh adaptation of the basic injunctions of Islam are urgently needed to remedy the evils and remove the hurdles created by unsalutary traditions and customs masquerading in the garb of religion. The task entrusted to this Commission is of vital importance as legislation relating to human relationships cannot

brook any further delay. The entire revision of our Procedural Law is likely to take a considerable time, and it is only right that a beginning should be made in this respect by tackling Family Laws first of all.

Defects of the present judicial system and the rigidity of Anglo-Muhammadan Laws.

Our present legal and judicial system is mainly a heritage of British rule. In the British system introduced into India, along with much that is valuable, a good deal of law and procedure came into the bargain that was unsuited to the life and genius of the people. Justice became frightfully complicated, dilatory and expensive, and litigation was encouraged to a ruinous extent. Like the Romans the British adopted the policy of non-interference in the personal laws of the different religious communities and so the Muslims in this respect were ruled by what is called Anglo-Muhammadan Law. Muslim law thus introduced ceased to be a growing organism responsive to progressive forces and changing needs. What was accepted as the personal law of the Muslims was conservative, rigid and in many respect [sic] undefined, but owing to political subjection any liberalisation or reconstruction was well-nigh impossible. Now that Pakistanis a free and sovereign State created expressly with the purpose of giving Muslims an opportunity to remould their lives and laws according to the fundamentals of Islam, there is no excuse for any further delay in converting that aspiration into reality. It has been specifically provided in the Constitution that within a year of the promulgation of the new Constitution a Commission shall be set up to look into the laws of the country with a view to bring [sic] them into conformity with the spirit of Islam and its express injunctions. We hope that the revision of the Procedural Laws, which is an urgent necessity, will be included in the terms of this reference because a complicated and dialtory procedure nullifies the beneficial effects of the best legislation.

The importance of Marriage and Family Laws.

Marriage and Family Laws form an important and substantial part of Muslim law. The work done by this Commission is a part of the wider scheme to which Pakistan is now committed. If the reforms proposed by this Commission are welcomed by the liberal

and enlightened section of the public and receive legislative sanction they will form an important contribution to the scheme of reconstruction demanded by all who are not fossilized by tradition or blinded by sheer authoritarianism.

Conformity to the basic principles of Islam.

The Commission, by its terms of reference cannot go beyond the fundamental principles of Islam and has neither any desire nor any intention to do so. The members of the Commission are of the firm conviction that the principles of law and specific injunctions of the Holy *Qur'ān*, if rationally and liberally interpreted, are capable of establishing absolute justice between human beings and are conducive to healthy and happy family life. They hold the view that Islamic law, through the centuries, has suffered much distortion and its liberal aspects have been ignored and suppressed. We have to go back to the original spirit of the *Qur'ān* and the *Sunnah* and lay special emphasis on those trends in basic Islam that are conducive to healthy adaptations to our present circumstances.

Sources of Muslim Law.

The Commission considers the four sources of Muslim law enunciated by the great *Imams* as comprehensive: The Holy *Qur'ān*, *Sunnah*, *Ijma* (Consensus) and *Qiyas* (Reasoning by analogy), and intends to make proposals in accordance with the one or the other. It must also be remembered that the doctrine of *Istihsan* (Common weal) is an integral part of Muslim law, according to Imam Abu Hanifa. In the past *Istihsan* has helped to solve several intricate and controversial problems, and there is no reason why we should not continue to avail of it in the future. As already stated, the Commission accepts the principle of *Ijtihad* and does not consider the laws and injunctions of Islam to be inflexible and unchangeable like the proverbial codes of Medes and Persians.

Method of Approach.

The members of the Commission have unanimously accepted one of the basic principles of Muslim jurisprudence that what is not categorically and unconditionally prohibited by a clear and unambiguous injunction is permissible, if the welfare of the individual or of society in general demands it. With respect to the codes of the renowned jurist *Imams* it holds the view that they

did not claim to be infallible. As they and their disciples openly differed among themselves it would be perfectly legitimate to accept the view of one in preference to the other. It is not necessary to accept the view and code of any one of them in its entirety. Even the Companions of the Holy Prophet debated hotly about vital issues and honestly offered varying interpretations. The Commission also holds the view that distinction should be made between the injunctions on the basis of their universality or applicability to a particular structure of society in a particular epoch and in a particular region. The institution of slavery may be cited as an obvious illustration. The express purpose of Islam was to abolish this inhuman institution, but as the entire structure of the ancient world was based on it, it could not be abolished at a single stroke. Islam issued injunctions to regulate and humanize it as much as possible with the ultimate objective to abolish it altogether whenever and wherever it becomes practicable. Accordingly Sayyedna Omar Farouq issued two decrees at intervals. At first he ordered that no Muslim shall be held in slavery and it was followed by another order that no Arab shall be a slave. If he had been vouchsafed another decade of life, he might have issued orders for universal emancipation. As fortunately, at long lost, humanity has done away with this nefarious institution, all injunctions relating to it have lapsed automatically. It follows from this that when institutions change, and the structure of society alters essentially, in the words of Tannyson [sic] 'the old order changeth yielding place to new and God fulfills [sic] himself in many ways lest one good custom should corrupt the world.' Reality is permanence as well as unceasing change.

The Religion.

The religion is defined by the Holy *Qur'ān* as belief in the unchanging laws of Nature and the basic principles of life that alter not. State and society while changing or feeling any urgent necessity for a change have to alter their superstructure without attempting to tamper with the eternally firm foundations, which according to the Holy *Qur'ān* are the basis of all religion. Islam desired humanity to hold firmly to certain fundamentals which, according to the symbolic language of the Holy *Qur'ān*, are indelibly inscribed on a Preserved Tablet called the Mother of the Book, or the Source Book of all life and existence. Nobody has

the right or the power or the authority to change these foundations : they are *Muhkamat*. Allah and His Prophet rebuked people who were addicted to putting unnecessary questions. It is related of the Holy Prophet that he said that that person is *Azlamunnas* (the prepetrator of most cruel tyranny over humanity) who pesters me with questions about those aspects of life in which men have been left free to exercise their own judgment and act according to their own conscience, because, the Prophet said, every answer given by me would become binding on my followers, thereby unnecessarily curtailing their liberty of action. This attitude of the Holy Prophet towards freedom of legislation in large undefined spheres is the basis of the accepted principle of Muslim jurisprudence that what is not definitely prohibited is permissible in the interest of public and private welfare, and is a charter for the freedom of legislation in matters wherein there are no categorical injunctions.

Shariat and Fiqh.

There is a tendency in the common people and among a section of the less learned theologians to confuse *Shariat* with *Fiqh*. No Muslim has a right to propose any changes in *Deen* or the *Shariat* which consists of those elements of law and rules of conduct that are binding on all Muslims and in which individual judgment can find no place. *Fiqh*, on the other hand, deals to a very large extent with details and interpretation of injunctions or concerns itself with situations that were not definitely envisaged by the *Qur'ān* and the *Sunnah*. When learned scholars like Shibli and Iqbal urge upon the *millat* the necessity of *Ijtihad* or the reconstruction of Muslim jurisprudeuce, it is not *Deen* or *Shariat* which they want to modify or adapt, but those parts of *Fiqh* which have lost all contact with present-day realities. Imam Abu Hanifa himself was accused of heterodoxy by the contemporary *Ulema* and was persecuted like many another great *Imam*. The history of *Fiqh* is full of differences and wranglings creating schisms about details and interpretations.

The Commission is not authorised or prepared to tamper with the *Shariat*, but its members and hundreds of Muslims who have answered the Questionnaire issued by the Commission, have exercised their judgment freely in matters that pertain to *Fiqh*. Law is ultimately related to life experiences which are not a monopoly

of the theologians only. There are recorded cases inw hich unlearned women corrected the *Khalifa* who gratefully acknowledged his error of judgment. If Muslim society has to become genuinely free and dynamic again, offering itself as a model for all other types of democracy, that original spirit of Islam has to be revived.

There is no question of amending the basis of the laws about marriage and family relations as promulgated in the Holy Book or any clear and authentic injunctions which could be derived from the *Sunnah*. The members of the Commission, as well as those from all spheres of society and different intellectual levels, who have pondered over the Questionnaire and sent replies, have acted with the conviction that it is not explicit Islamic injunctions that are to be amended or altered ; they are only to be liberally and rationally interpreted and properly implemented. The necessity for this Commission arose from the fact that ignorance of Islamic laws on the part of the general public is as much responsible for the ills and evils that have cropped up in marital relations as the unprogressive rigidity of the Anglo-Muhammadan Law and the complicated, dilatory, and expensive procedure of the judicial system introduced by the British. Laws originating in the opinions of early jurists could have been modified according to new social needs by a progressive and dynamic society and Procedural Laws of the Indo-British Courts should have been simplified for expeditious justice. If we have separate matrimonial courts presided over by judges well versed not only in the current laws that were presumed to be Islamic, but had extensive acquaintance with the liberal principles of Muslim jurisprudence, a good deal of evil could have been averted. A second source of the trouble is that the personal laws of the Muslims were not codified in an unambiguous manner for the guidance of the judge. A substantial part of this law had received no legislative sanction. Every case in the court was disputed *de novo* ; the judges as well as the litigants could quote contradictory authorities. The helplessness of the women in particular is exploited ruthlessly not only by some husbands but even by their own parents, brothers and other male relatives. Marriages are contracted without the free consent of the parties and in some communities girls are sold like cattle to prospective husbands, the one offering the

highest bid to the father of the girl getting her without her knowing or approving of the man. The *Mehr* or marriage gift by the husband to the wife, which was meant to give her some economic status and security, is seldom paid. In a large number of cases it is alleged to be a bogus transaction. The wife has neither the courage nor the means to enforce its payment because of the dilatory and ruinous procedure of our courts. Although only a small percentage of men in our society resort to polygamy, but their motives and behaviour in this respect are almost always anything but rational and Islamic. Islam has not categorically prohibited polygamy but permitted it only to meet certain contingencies and has made it conditional on the will and capacity of the husband to dispense equal justice. Law and the law courts ought to have been the guardians of society to see that the condition of justice and equity is not violated. But our judiciary, as at present constituted was not in a position to enforce it or take cognizance of injustice resulting from polygamy, thereby allowing unrestricted polygamy to the detriment of the first wife and her children who became innocent victims of the helplessness or the connivance of law.

Quite a large number of cases in the matter of marriage, divorce and inheritance arise because of utter lack of evidence either of marriage or of divorce. Sometimes two men claim a woman having been married to them. Both of them bring in witnesses in their support and the court feels helpless for lack of any reliable documentary evidence. Similarly divorce becomes a matter of dispute because there is nothing to prove or disprove it. The *Qur'ān* and the *Sunnah* had enjoined on the Muslims to put down economic transactions and wills in black and white with witnesses thereto, but the Muslims neglected the means of producing reliable written evidence in the most vital of all transactions, *i.e.*, marriage and divorce. Any one in the presence of two witnesses can now perform the *Nikah* and even an unregistered written *Nikah-nama* is not considered necessary. Later on when the *Nikah Khawan* and the witnesses have disappeared either by death or by having migrated to unknown distant places no evidence of the *Nikah* is left. It happens sometimes that the *Nikah Khwan* or the witnesses may deny having taken any part in a particular marriage. Islam enjoined writing in transactions and

wills when hardly one person in a hundred could read and write. Now that in every civilized society the number of literates has increased enormously, it is high time that the evidence of marriages and divorces be placed on a firm footing that makes any ambiguity or denial impossible.

It is hoped that the recommendations of this Commission, which are in complete conformity with the principles of Islam as enunciated in the Holy *Qur'ān* and the *Sunnah*, will not only eradicate the evils alluded to above, but will also usher an era of domestic happiness.

Questionnaire.

We now proceed to record our opinion in respect of the various questions included in the Questionnaire. It may be stated that all the decisions of the Commission in respect of these questions were unanimous, except that Maulana Ehtishamul Haq Sahib dissented from the opinion of the remaining members of the Commission on three or four points. The opinion of the Maulana is embodied in his note of dissent; which is appended* to this report. The members of the Commission were of the view that the note of the Maulana Sahib should be appended to the report in original as that would express the opinion of the Maulana in his own words. If this note is translated from Urdu into English, it might be stated that the translation had in some way not expressed the basic idea underlying the note of dissent. Mr. Enayat-ur-Rehman of Dacca did not find it possible to attend any of the meetings of the Commission, but when a copy of the Draft Report was sent to him, he expressed his complete agreement with the final conclusions of the Commission.

NIKAH

Questions Nos. 1, 2 and 9.

Questions Nos. 1, 2 and 9 are allied and will be dealt with together. For facility of reference we reproduce the questions here :—

1. *Should* Nikah *be performed by State-appointed* Nikah-Khwans *only?*

2. *Should there be compulsory registration of marriages, and*

*Will be published as a supplement as soon as it is received.

if so, what machinery should be provided therefor? What should be the penalty, if any, and who is to be penalized for non-registration?

9. *Should a standard* Nikah-nama *be prescribed and its execution made compulsory at the time of the solemnization of the* Nikah?

A large number of persons who have answered the Questionnaire have stated that the institution of State-appointed *Nikah-Khwans* is likely to give rise to a lot of corruption and unnecessary harassment of the public, and that it is not feasible in rural areas. It has been observed by some learned theologians that in each case the *Nikah-Khwan* should belong to the particular sect to which the marrying parties belong. Some of these objections have a great deal of force in view of our stage of development. Moreover, if only State-appointed *Nikah Khwans* have to perform the *Nikah* at least 12,000 *Nikah-Khwans* shall have to be appointed in Western Pakistan alone taking one *Nikah-Khwan* for every 25 square miles. Even so, some people will have to call a *Nikah-Khwan* from a distance of 6 miles. The expense and supervision relating to this extensive machinery would impose an unbearable burden on the State. This becomes unnecessary if we make registration of *Nikah* compulsory, and if we prescribe a standard *Nikah-nama*.

The registration of marriages must be made compulsory as complex questions relating to the validity and existence of *Nikah* between certain parties arise very frequently in civil and criminal courts. It often happens that of two men each claims to be the husband of the same woman, in order to escape being convicted under section 498 of the Pakistan Penal Code for abduction. Difficulties also arise in cases relating to inheritance. Very often one of the claimants to a large amount of property dubs the defendants as illegitimate sons; and the case is difficult to decide for lack of all documentary evidence. In suits relating to maintenance, a great deal of oral evidence is produced to prove that the woman claiming maintenance is not a legally married wife but a mistress or a keep. Registration would be facilitated if a standard *Nikah nama* is prescribed. We suggest that the Government should print a *Nikah-nama* in triplicate and it should be offered for sale at every post office at a nominal price of annas 8. At the time of *Nikah* entries should be filled in and one copy

handed over to the bride-groom, the second to the bride or her guardian, and the third should be despatched by registered letter (A.D.) to the Tehsildar of the Tehsil where the parties reside. The Tehsildar should keep a register wherein all these *Nikah-namas* or certificates of marriage are copied out. It shall be the duty of the *Nikah-Khwan* to remit the *Nikah-nama* by registered post to the Tehsildar. If he fails to do so, he should be made liable to criminal prosecution and punishable with a fine not exceeding Rs. 500. Such provision already exists in the Parsi Marriage Act. This step is not without precedents in Muslim history and some Muslim countries introduced this reform about 40 years ago. In Algeria the deed of marriage is required by law to be registered although it appears that the *Nikah* can be performed by anyone. Khalifa Haroon-ur-Rashid insisted on all Muslims and *Zimmis* registering their marriages. (Amir Ali's Muhammadan Law, Vol. II, page 307).

Question No. 3.

3. *What machinery should be provided to ensure that the marrying parties have freely consented to marry each other, and that neither of them has been a victim of undue influence?*

In the conditions prevailing in Pakistan, it is not feasible that a Government official should be present at the time of every *Nikah* to satisfy himself that the marrying parties have freely consented to marry each other. The demand of a large number of women's organisations to this effect does not appear to us to be practicable. As we are prescribing a standard *Nikah-nama*, entries should be made therein relating to the consent of the bride and the bride-groom. If the marrying parties are literate they should sign, if illiterate they should affix their thumb impressions. These signatures or thumb-impressions shall be attested by the *Kikah-Khwan* and the two witnesses of the

Note to Questions Nos. 1, 2 & 9.

The Quranic basis for the above recommendations can be derived from the verse about money transactions The Holy Book enjoins on the Muslims to put such transactions into writing The marriage contract is much more important than any mere commercial transaction, as it includes a contract about *Mehr* which is technically called دین مہر *viz.* a debt payable by the husband.

اذا تد ایتم بدین الی احل مسمی فا کتبوہ

When you are borrowing or lending money for a stipulated period you should reduce it to writing.

Nikah. We are conscious of the fact that the machinery proposed above may be inadequate, but we hope that with the spread of education even women in rural areas will probably refuse to sign the *Nikah-nama* if they have not given their consent freely.

Questions Nos 4 and 5.

4. *Would you prevent child marriages by legislating that no man under eighteen and no woman under sixteen shall enter into a contract of marriage ?*

5. *Is the fixation of these age limits prohibited by the Holy Qur'ān or any authoritative Hadith ?*

It is the opinion of all the members of the Commission, with the exception of Maulana Ehtishamul Haq Sahib, that child marriages should be prevented by legislating that no man under eighteen and no woman under sixteen shall enter into a contract of marriage. The Commission is of the opinion that such legislation will be in perfect conformity with the injunctions of the Holy *Qur'ān* and *Sunnah*. The Holy *Qur'ān* makes not only puberty but a definite stage in the development of intelligence as a condition precedent for entrusting property to the orphans. The question of marriage may be decided on the same footing because the entrusting of the life of marrying-parties to each other is an affair of greater importance than mere entrusting of property. The Maulana Sahib did not agree with this point of view, but stated that the age of puberty should be prescribed as the ultimate limit. The fixation of the age limit in the opinion

Note to Questions Nos. 4 & 5.

حتی اذا بلغوا النکاح فان آنستم منهم رشداً فادفعوا الیهم اموالهم

When the orphans attain puberty their property should be handed over if you find that they have also *developed sufficient maturity of intelligence.*

The Holy *Qur'ān* in the verse quoted above makes not only puberty but a definite stage in the development of intelligence as a condition precedent for entrusting property to the orphans. The matter of marriage may be judged according to this instruction as a contract of marriage is of infinitely greater importance than mere transfer of property. Child marriages were not categorically prohibited by any injunction because in certain stages of social development they may be comparatively harmless, but Islam definitely wanted humanity to take further strides in social evolution It is time now that the original trend of Islam that the contracting parties should not only have reached puberty but developed in reason and intelligence for all important transactions of life should be enforced. It would mean progressing on the lines indicated by the Holy Book. Some of the customs of ancient times were tolerated by Islam but were never meant to be perpetuated.

of the Commission is not prohibited by the Holy *Qur'ān* or any authoritative *Hadith*.

Questions Nos. 6 and 7.

6. *Do you agree that any condition may be inserted in the marriage contract which is not repugnant to the basic principles of Islam and morality, and that all such conditions shall be enforceable in a law-court ?*

7. *Do you agree that it should be enacted that it would be lawful to provide in the marriage contract that the woman will have the right to pronounce divorce exactly in the same manner as the man ?*

There is a consensus of opinion that marriage under Muslim law is a civil contract, and any conditions which are not repugnant to the basic principles of Islam and morality can be inserted in the *Nikah-nama* and that all such conditions can be made enforceable in a court of law. The Commission is also of the opinion that it should be enacted that it is lawful to provide in the marriage contract that the woman shall have the same right to pronounce divorce, if the right to do so has been delegated to her in the marriage contract, as a man. The doctrine of *Tafweez*, conditional as well as absolute, has been recognised as valid in Islamic law from the very beginning.

Question No. 8.

8. *What steps should be taken to prevent the sale of daughters in certain classes, and the receipt of money by the parents or guardians ?*

Note to Question No. 6.

The Holy Prophet emphasized the fact that of all the transactions into which persons enter and of all the conditions accepted by a person solemnly, the conditions relating to marriage are the most deserving of being fulfilled.

احق الشروط ان توفوا به ما استحللتم به الفروج (بخاری)

The conditions most deserving of being fulfilled are those that are attached to the fact and act of marriage.

Note to Question No. 7.

The right of pronouncement of divorce by the wife granted to her by the husband in the marriage contract or after the marriage at any time is technically called *Tafweez* and is accepted as lawful by all Muslim jurists. *Tafweez* may be granted and exercised by the wife on certain conditions, but if no conditions are mentioned it is taken as an unconditional right.

وفی " طلقی نفسک متی شئت " لایتقید بالمجلس - (شرح وقایه)

If the husband at the time of marriage or at any time during the married life has said to his wife that you can divorce yourself whenever you like, this right of the wife becomes absolute for the whole of her life.

The sale of daughters by parents or guardians is condemned by all persons who have answered the Questionnaire. A vast majority of them have stated that it should be made a cognisable offence and the parents and guardians should be liable to imprisonment ranging up to 5 years. The Commission realize that it is very difficult to obtain proof of such sales, but if such a transaction can be established it should be treated as a criminal offence and visited with a heavy penalty. It often comes to the notice of the law courts that some girl has been married repeatedly by the parents to various individuals after extracting large sums of money from them one after the other; in such cases the parents deserve to be heavily penalized.

DIVORCE BY THE HUSBAND

Question No. 1.

1. *If a husband pronounces* talaq *three times at a single sitting, should it be recognized as a valid and final divorce or should three pronouncements during three* Tuhrs, *as enjoined by the Holy* Qur'ān, *be made obligatory?*

In respect of this question Maulana Ehtishamul Haq stated that all the four *Imams* had laid down that three pronouncements of *talaq* at a single sitting constitute an irrevocable *talaq* and that it is not open to this Commission to make any recommendation which is not in accordance with the views of the *Imams*. It was, however, pointed out in the discussion that during the period of the Holy Prophet, the first Caliph Abu Bakr, and for some years in the reign of Hazrat Umar, three pronouncements of *talaq* at one sitting were regarded as only one pronouncement. It is further recorded that Hazrat Umar made three pronouncements at one sitting an irrevocable *talaq* as a punitive measures [sic] to punish those who had made a vain sport of the injunctions of the Holy *Qur'ān* and *Sunnah*. Hazrat Umar, inspite [sic] of accepting such a *talaq* as final, used to punish the persons who resorted to it. It is also recorded that Hazrat Umar repented later on as the change introduced by him was not strictly in accordance with the Holy *Qur'ān* and the *Sunnah*, and it made divorce easy for those who wanted to indulge in it. At this stage it will be profitable to give a quotation from Dr. Mehmassani's famous book on the history

of Muslim law, which has been translated into Urdu from Arabic and is named "فلسفه شریعت اسلام" At page 171 the following passage occurs :—

"جب شوہر اپنی بیوی کو ایک ہی نشست میں تین بار طلاق دے دے تو رسول اللہ صلعم - ابوبکر صدیق اور عمر بن خطاب کے اوائل خلافت میں وہ ایک ہی طلاق شمار ہوتی تھی اور اس وقت یہی طریقہ رائج تھا* بعد میں اس پر اجماع ہوگیا تھا"

باوجود اس کے عمر بن خطاب نے ایسی طلاق کو طلاق بائن قرار دیا - گویا مرد کے لفظوں کے مطابق تین طلاقیں - وجہ یہ تھی کہ جب حضرت عمر بن خطاب نے دیکھا کہ لوگوں نے اس قسم کی طلاق کو ایک کھیل بنا لیا ہے اور ایسی طلاقیں بکثرت دی جانے لگی ہیں تو آپ نے انہیں سزا دینے اور اس بری عادت سے روکنے کی غرض سے یہ تبدیلی کردی -

"عمر بن خطاب نے اپنے زمانہ کے حالات کے لحاظ سے جس رائے کو بہتر سمجھا تھا اسے بعض فقہا نے اپنے زمانے کے حالات کے اعتبار سے بہتر نہ سمجھا اور انہوں نے تغیر احکام کے اصول کے مطابق سنت نبوی کی طرف رجوع کرنا مناسب خیال کیا †-"

معاصرین میں سے ایک بڑے‡ فاضل نے عمر بن خطاب کے اس عمل پر تبصرہ کیا ہے کہ عمر کا یہ فعل ایک ہنگامی حکم کی حیثیت رکھتا ہے جو امام وقت (عمر) نے بضرورت سیاست دیا تھا -

فاضل مذکور نے مسئلہ کی وضاحت کرتے ہوئے کہا ہے کہ "جو احکام قرآن یا سنت کی نص تصریح سے ثابت ہیں - انہیں نہ کسی کو تبدیل کرنے کا حق ہے اور نہ کوئی ان احکام کے علاوہ کسی دوسرے حکم کو اختیار کرنے کا مجاز ہے - خواہ ایک شخص ہو یا پوری جماعت -"

The above quotation un-mistakably proves that during the period of the Holy Prophet, the injunctions of the Holy *Qur'ān* which correspond with *talaq-i-ahsan* and *talaq-i-hasan* were strictly followed and pronouncement of three *talaqs* at a single sitting was regarded only as one pronouncement.

*دیکھو حدیث ابن عباس - صحیح مسلم میں بشرح نووی (جلد ۱۰ صفحہ ۷۰)

†دیکھو اعلام الموقعین (جلد ۳ - صفحہ ۲۴ - ۳۲) اور دیکھو قانون مصری نمبر ۲۵ - ۱۹۲۹ -

‡فضیلت مآب شیخ احمد محمد شاکر نے اپنی کتاب "نظام الاخلاق فی الاسلام" میں لکھا ہے - مطبوعہ مصر ۱۳۵۴ھ نمبر ۱۰ -

Islam inculcates happiness and security in family life which require that easy divorces should be prevented. It is stated in the Hadith that out of all the things permitted by God divorce is the most disagreeable in the Sight of God.

ان ابغض الحلال عندالله الطلاق

The original injunction of the Holy *Qur'ān* about divorce prescribed a very rational procedure to prevent it, if possible. First of all an effort should be made for conciliation with the help of well-wishers of both the sides and thereafter a considerable period, amounting to three months, is to be allowed for chances of reconciliation so that family life may not be disrupted.

The pronouncement of three *talaqs* at a single sitting has always been called *Talaq-i-Bidat* by all the jurists. *Talaq-i-Bidat* means undesirable innovation. The very name condemns it as un-Islamic. A leader of a religio-political party in Pakistan has stated in his answer that "although all jurists have accepted it as final, and a valid divorce and irrevocable, it is really un-Quranic. It is a sin and a punishable crime." Many other theologians

Note to Question No 1.

There is a Hadith related by Rukana ibn-Abd-i-Yazid included in the Musnad-i-Ahmad and Abu Ya'la that he (Rukana) pronounced divorce three times in one sitting and the Holy Prophet held that it shall amount only to one pronouncement which is not sufficient for the dissolution of marriage by divorce, that is to say he considered it to be revocable.

Some of the great jurists who strictly followed this injunction of the Holy Prophet are : زبیر بن عوام (Zubair-ibn-Awwam) عبدالرحمن بن عوف (Abdur Rahman-ibn-e-Auf) عکرمه (Ikrema) طاؤس (Taoos). محمد بن اسحاق (Mohammad-ibn-e-Ishaq) خلاس بن عمر (Khallas-ibn-e-Amr) حارث عکلی (Haris Akli, داؤد بن علی (Dawood-ibn-e-Ali) and most of his followers, some *Malakis*, some *Hanafis*, and some *Hanbalis* as ابن تیمیه (Ibn-e-Taimyyah) and ابن قیم (Ibn-e-Qayyim), held such a divorce as revocable. (See Elamul-Muaqein اعلام الموقعین by Ibn-e-Qayyum).

There is another Hadith in the collection of *Nasai* related by Mahmud-ibn-i-Labid wherein it is related that a husband pronounced divorce three times in a single sitting. When the Holy Prophet came to know of this he admonished the man saying :

ایلعب بکتاب الله وانابین اظهرکم - (نسائی عن محمود بن لبید)

'Are you idly playing with the injunctions of the Holy Book of Allah while I am still among you'.

from the beginning of Islam down to the modern time have been of the opinion that the pronouncement or divorce three times at one sitting amounts to the pronouncement of divorce only once, and such a divorce does not in any way effect dissolution of marriage. It is essential that this divorce should be followed by two further pronouncements in two subsequent *Tuhrs*. This opinion should be given legislative effect. This is an important reform, and if enacted will bring into force the law as laid down by the Holy *Qur'ān* and the *Sunnah* and followed by the first Caliph. It is authentically reported by Ibn-i-Qayyum that Caliph Umar was extremely sorry to have allowed it even as an emergency measure. (Ighasatullahfan اغاثة اللهفان p. 151).

Questions Nos. 2 and 3.

2. *Should there be compulsory registration of divorces ?*
3. *What should be the penalty for non-registration ?*

It has already been pointed out that in cases of abduction the abductor often alleges that the first husband had pronounced a final divorce, and that he had thereafter married the woman and therefore was not guilty. The same woman is claimed as wife by the first husband as well as by the second husband. The same question also arises frequently in civil litigation in suits relating to inheritance and legitimacy, and a great deal of time and money is wasted in trying to establish as to whether a woman had or had not been divorced by her first husband. These anomalies and absurdities would not arise if registration of divorces is made compulsory by legislation. We recommend that a standard *Talaq-nama* should be prescribed, and printed in triplicate and should be made available at every post office for a nominal price of As. 8. The entries in the *Talaq-nama* should give specific details as to how the *talaq* had been effected, whether by one pronouncement and thereafter abstaining from marital intercourse for the period of *Iddat* or pronouncement of *talaq* at three different times in three *Tuhrs*. A copy of this deed of divorce should be sent to the Tehsildar by registered post and should be copied out in a register to be kept by him. If there has been no registration of the deed of divorce the husband shall be liable to a fine not exceeding Rs. 500.

It was contended by some members of the Commission that registration of divorces was not sufficient to safeguard the

interests of the women. It was pointed out by them that it often happens that a husband pronounces three divorces at one sitting and then turns out the first wife and her children. Immediately thereafter he brings the second wife to his house, and the first wife and her children are left in complete isolation without a roof on their heads and without any provision for their maintenance. It was suggested that it should be enacted that no one can divorce his wife without recourse to a Matrimonial and Family Laws Court. When a court is approached, it should not permit the person to pronounce divorce until he has paid the entire dower and made suitable provision for the maintenance of his first wife and her children. Even if the dower is to be made payable by instalments, there should be an order of the court decreeing the amount and fixing the number of instalments. Maulana Ethishamul Haq opposed this suggestion. The other members of the Commission, however, approved of the suggestion and held that the Government should legislate that no one shall divorce his wife without recourse to the Matrimonial and Family Laws Court. Maulana Ehtishamul Haq held that the above suggestion can be carried out by inserting a condition in the standard *Nikah-nama* to the effect that the husband gave up the right of pronouncing *talaq* except in a Matrimonial and Family Laws Court. The Maulana Sahib was of the opinion that if this procedure were adopted, it would become Islamic to lay down that no one can pronounce *talaq* except before a judge of a Matrimonial and Family Laws Court. It is clear therefore, that the Maulana Sahib did not disagree in principle with the suggestion that the intervention of a Matrimonial and Family Laws Court was essential for the purpose of the dissolution of marriage at the instance of the husband. Whichever course is adopted, the net result is that no divorce should be permitted or regarded as valid without the intervention of a Matrimonial Court. If a Matrimonial Court's intervention is made essential, it would be unnecessary to provide for the registration of divorces, as an attested copy of the record of Court would serve the same purpose as registration of divorces.

Question No. 4.

4. *Should conciliation committees be appointed for different areas and no divorce be recognised as valid till the parties have applied to the conciliation committee which should co opt one member of the husband's family and one member of the wife's family ?*

It is recommended that the *Qurānic* injunction that whenever parties somehow do not get on well and want divorce, relations and friends of both the parties should make an attempt at conciliation should be followed [sic]. It is only when such attempts have failed that the required process for divorce should start. In cases of divorce, it should be clearly mentioned that friends and relations of both the parties had made serious efforts at conciliation which had unfortunately not succeeded. In some Western countries judges of the Matrimonial Courts make efforts at reconciliation at pre-trial hearings before starting formal judicial proceedings. The Commission recommends that the judges of our proposed Matrimonial Courts should also make this laudable attempt which is likely to succeed in a number of cases.

Question No. 5.

5. *Should it be open to a Matrimonial and Family Laws Court, when approached, to lay down that a husband shall pay maintenance to the divorced wife for life or till her remarriage ?*

The Commission was of the opinion that such a discretion should be vested in the Matrimonial Court, and that a large number of middle-aged women who are being divorced without rhyme or reason should not be thrown on the street without a roof over their heads and without any means of sustaining themselves and their children. Of course, it would be open to a Matrimonial Court to refuse to sanction any maintenance if the woman is at fault.

DIVORCE SOUGHT BY THE WIFE

Question Nos 1 and 2.

1. *Do you regard the provisions of the Dissolution of Muslim Marriages Act, 1939, satisfactory or would you enlarge or amend them in any particular ?*

2. *Would you embody the* Khula *form of* talaq *in a legislative enactment to make it more certain and precise ?*

The Commission is of the opinion that the provisions of the Dissolution of Muslim Marriages Act, 1939, do not require any

modification. It was also agreed that supplementary legislation may be undertaken to make the *Khula* form of *talaq* more certain and precise. About *Khula*, that is divorce sought by wife, there is a consensus of opinion that Islam has granted this right to the woman if she foregoes the *Mehr* or a part of it, if it is so demanded by the husband. There is a universally accepted Hadith about a *Khula* case which arose between a woman of the name of Jamila and her husband Sabit ibn-Qais. The Holy Prophet granted the divorce on the basis of extreme incompatibility of temperament only; no other accusation was made by the wife as a ground for the demand of divorce. We are recommending that incompatibility of temperament should not give the wife a right to demand a divorce except in the *Khula* form.

POLYGAMY

Question Nos. 1 and 2.

1. *The* Qurānic *verse dealing with polygamy occurs only in connection with the protection of the rights of orphans. (Verse III. Surat An-Nisa). Is polygamy prohibited except when the protection of the rights of the orphans is the main objective?*

2. *Should it be made obligatory on a person who intends to marry a second wife in the life-time of the first to obtain an order to that effect from a court of law?*

There is only one verse in the Holy *Qur'ān* which deals with the question of polygamy. This verse was revealed to solve certain difficulties which had arisen in the matter of orphan-girls and widows. The permission to marry more than one wife originated for the establishment of social justice. According to this verse there was a fear of orphan-girls and widows being exploited or unjustly dealt with. For that the Holy *Qur'ān*, as a matter of emergency, permitted Muslims to marry more than one woman. But a proviso was attached to this permission that if this way of solving the problem leads to injustice in family relations then the Muslims are advised to practise monogamy only. Experience has confirmed that many Muslims indulge in polygamy, disregarding the original reason of the permission, and waiving aside the condition of doing equal justice between the two wives. The abuse of this conditional permission makes it necessary for the

State to see that polygamy is not practised except in cases where it could rationally be justified, as justice is a condition precedent for this permission. It is incumbent on the State to prescribe a procedure which would prevent people from taking advantage of this permission without any restrictions being placed on them. It is a universally accepted maxim that prevention is better than cure. It would be absolutely in the interest of justice and in conformity with the spirit of the Holy *Qur'ān* that a man contemplating to have a second wife should present himself before a court to explain the circumstances which, according to him, justify his taking this step. There may be some cases in which there may be rational justification and in such rare cases, the court could permit a man to take a second wife only on the condition that in the matter of maintenance and other treatment no injustice is done to the first wife and her children. The Commission is of the opinion that this step will greatly curb the unrestricted and uncontrolled practice of polygamy which causes so much distress in family life.

Apart from monetary considerations a person applying to the Matrimonial and Family Laws Court for marrying a second wife in the life-time of the first should satisfy the Court that the first wife is insane, or is suffering from some incurable disease or that there are other exceptional circumstances which make his second marriage an inescapable necessity, and that he is not taking a second wife merely because he wishes to marry a prettier or a younger woman than his first wife.

In such matters the court shall also see whether a man desiring to have a second wife and a second family is capable financially of supporting two families, satisfying their basic needs of life and guaranteeing the standard of living to which his first wife and her children have been accustomed. The court shall ascertain the wishes of the first wife also, and if she insists on living separately from her husband and the second wife, the court shall not pass any order permitting the second marriage unless adequate arrangements are made by her husband for suitable separate accommodation and other amenities for the first wife. It would be open to the court to make provision that an adequate part of the salary of such an individual is paid directly to the first wife and her children. Those who do not enjoy any

fixed salary should provide some guarantee to the court for the prompt payment of suitable maintenance to the first wife and her children. In special cases, for reasons to be recorded by the court, it would be open to the Matrimonial and Family Laws Courts to vary the allowance payable to the first wife.

Some persons who have answered our Questionnaire have stated that it would be un-Islamic to force a person to go to a court of law before he can contract a second marriage. They have observed that if a person can be forced to obtain an order of the Court for a second marriage why should he be not required to obtain an order of a court even for his first marriage? These arguments are based on a fallacy. It is only when a person wishes to marry a second wife that the injunction to do *Adl* between the two wives comes into operation. At the time of the first marriage no question of equitable distribution of resources between two women arises. We are forcing a person to go to a court of law before he can celebrate a second marriage, because the permission to take a second wife is hedged in by the Holy *Qur'ān* with qualifications and conditions. Whenever a social right is made subject to certain conditions, it is incumbent to provide machinery to determine whether the conditions attached to the permission have been fulfilled or are capable of being fulfilled by the person who wishes to take advantage of the special permission granted to him. The State, in the shape of judicial courts, is the proper authority to obtain fulfilment of the conditions. The Matrimonial Court would thus be enforcing a stipulation enjoined by the Holy *Qur'ān*. How can be the interference of the court to enforce a *Qurānic* condition be termed as un-Islamic?

Maulana Ehtishamul Haq did not agree with the other members of the Commission that recourse to a Matrimonial and Family Laws Court should be made a condition precedent for a person wishing to marry a second wife in the life time of the first wife. The views of the Maulana Sahib will be elaborated by him in his note of dissent.

Question No. 3.

3. *Should it be laid down that no court can grant such an order till it is satisfied that the applicant can support both wives and his children in the standard of living to which he and his family have been accustomed?*

In the opinion of the Commission it should be enacted that no court shall grant an order permitting a person to marry a second wife until it is satisfied that the applicant can support both the wives and his children in the standard of living to which he and his family have been accustomed. Some of those who have answered the Questionnaire have stated that legislation of this type will help wealthy persons to take a second wife, while it will deprive the poorer applicants from obtaining an order in their favour. This criticism is unsound. Every person who makes an application to a Matrimonial Court for marrying a second wife will have to satisfy the court that he has a valid reason for marrying a second wife in the life-time of the first. If no valid reason can be established, the applications will be dismissed. If, however, a valid reason can be established, the applicant will have to satisfy the court that he can support both wives and his children in the standard of living to which he and his family have been accustomed. The economic consideration is an additional condition for obtaining the permission, but it does not eliminate the other conditions. Moreover, the Holy *Qur'ān* enjoins *Adl* (عدل) between the two wives and emphasises the fact that any person who cannot support two wives should not take a second wife.

Question No. 4.

4. *Should it be laid down that the court shall make provision that at least one-half of the salary of such an individual is paid directly to the first wife and her children?*

The Commission is of the opinion that it should not be laid down that the applicant will pay at least one-half of his salary to the first wife and her children. The question of the maintenance of the first wife and her children shall be left to the discretion of the Matrimonial Court. In some cases one-half of the salary may not be enough for the maintenance of the first wife and her children. In other cases, where an applicant is also supporting his parents and other poorer relatives, he may not be in a position to pay one half of his salary to the first wife. The Matrimonial Court should take all these facts into consideration, and thereafter pass an order for the amount of maintenance due to the first wife and her children before granting the applicant permission to marry a second wife.

Question No. 5.

5. *In the case of persons who do not enjoy a direct salary, should the court demand guarantee from the applicant for the payment of at least half his income to the first wife and her children?*

The remarks made in respect of Question No. 4 as to the amount of maintenance apply to this question also. The Commission is, however, of the opinion that in the case of persons who do not enjoy a direct salary, some guarantee should be demanded from the applicant for the payment of adequate maintenance to the first wife and her children.

MEHR

Question No. 1.

1. *Should it be enacted that the* Mehr *fixed in the marriage contract shall be payable however high it may be?*

A vicious custom has grown up in our society of fixing an inordinately high sum as *Mehr* without any intention of paying it. It is often stated that a large sum had been fixed as *Mehr* merely as a matter of prestige of the husband or to do honour to the status of the wife. The result is that even in cases where a large amount of dower has been genuinely fixed, a defence is taken, if litigation ensues, that the *Mehr* was not meant to be paid and that the intention of the parties was that it shall never be claimed. This necessitates the framing of a number of unnecessary issues by the court, and the civil suit relating to dower lasts sometimes for 10 years. In a great many cases when the woman loses the suit in the first court, she is unable to persue [sic] the remedy in the appellate court as it involves a large amount of court fees. Even after a decree has been obtained, the litigation continues for years before the decree can be executed. If such a defence is ruled out by law, cases of dower instituted by women would be decided promptly and the vicious process alluded to above will gradually disappear. It should, therefore, be enacted that a husband will have to pay the *Mehr* fixed in the marriage contract however high it may be.

Question No 2.

2. *Do you approve that there should be no period of limitation in a suit for* Mehr*?*

As the law at present stands, if a woman demands her dower from her husband and he refuses to pay, she must institute a suit for dower within three years of her demand. If on account of reconciliation with her husband she does not sue for three years, her right to claim dower disappears for ever and thereafter she can never claim it. This leads to a great deal of injustice owing to the ignorance of law on the part of a large majority of women. It should, therefore, be enacted that there shall be no period of limitation in a suit for *Mehr*.

Question No. 3.

3. *Are you of the opinion that if there is no specification in the* Nikah-nama *concerning the time of payment of* Mehr *then half of it should be regarded as* Mu'ajjal (*payable on demand*) *and the other half as* Mawajjal (*deferred*) *payable on the dissolution of marriage either by death of the husband or by divorce?*

The Commission is of the opinion that if no details about the mode of payment of *Mehr* are given in the *Nikah-nama*, the entire *Mehr* shall be presumed by the court to be payable on demand.

CUSTODY

At present the mother is entitled to the custody of the person of her minor children only up to a certain age, i.e. *the male child up to 7 years and the female child till she attains puberty. These limits have no authority either in the Holy* Qur'ān *or Hadith, but have been fixed as the result of opinions of some Muslim jurists. Do you consider it admissible to propose some modifications?*

In the opinion of the Commission it is admissible to propose changes in the matter of the custody of minor children, as the Holy *Qur'ān* and the *Sunnah* have not fixed any age limit, and some of the great *Mujtahid Imams* have expressed the view that the matter of age limit in this respect is an open question.

MAINTENANCE OF WIFE AND CHILDREN

Question No. 1.

1. *Are you in favour of enacting that if the husband neglects* or

ليس للحضانه مدة معلومه - (كتاب الفقه ج ٥٩٣٣)

Imam Shafaie has said that there is no age-limit for the custody of children.

refuses to maintain his wife without any lawful cause, the wife shall be entitled to sue him for maintenance in a special Matrimonial and Family Laws Court ?

At present it is impossible for a neglected wife to get any adequate relief against her husband, as a suit for maintenance is governed by complicated Procedural Laws and cannot be finally decided in any reasonable length of time. After a decree has been passed against the husband for maintenance, he rushes to the appellate court and gets the execution of the decree stayed pending hearing of the appeal. Thereafter he delays the final disposal of the appeal by various subterfuges, with the result that no final decision can be arrived at for about five years. Even if the wife gets a decree the number of objections that can be raised by an unscrupulous husband during the course of execution are so numerous that it is said that the real trouble of the wife begins when she starts to execute the decree. In order to avoid these most unfortunate consequences, it is essential that the wife should be given the right to sue a husband for maintenance in a special Matrimonial and Family Laws Court, and that the order of such a court should be executable in a summary manner. For instance, the money payable by the husband as maintenance may be made realizable as arrears of land revenues.

Question No. 2.

2. *Under section* 488 *of the present Code of Criminal Procedure the wife can apply to a Criminal Court for maintenance. The Criminal Court can pass an order for maintenance not exceeding a monthly allowance of Rs.* 100. *Are you in favour of increasing the limit permissible under the Criminal Law ?*

When a wife is very hard up she can, as the law at present stands, apply to a Criminal Court for maintenance. The Criminal Court can generally pass an order expeditiously for maintenance. Under section 488 of the Code of Criminal Procedure, however, the court cannot grant maintenance exceeding a monthly allowance of Rs. 100. The Commission is of the view that, in view of the enormous increase in the cost of living, the court should be allowed to grant maintenance to the wife up to a maximum of Rs. 300 per mensem. The right to claim maintenance through the Criminal Court should, in the opinion of the Commission, be retained as maintenance sanctioned by a Criminal

Court can be realized as it were a fine. This summary mode of realization is of the greatest assistance to a starving wife. It may be objected that when a civil suit for maintenance is likely to be decided expeditiously by a special Matrimonial and Family Laws Court, where is the necessity of providing a remedy to the wife in a Criminal Court. We consider it necessary that the wife should continue to enjoy the right because the amount of maintenance ordered by a Criminal Court can be realized as it were a fine under the Criminal Law. This method of realization is so prompt and so effective that the husband often deposits the amount of the maintenance ordered by a Criminal Court even before the expiry of the month to which it related. Until we have a great deal of experience of the working of the Matrimonial and Family Laws Courts, this valuable right which a wife at present possesses should not be taken away.

Question No. 3.

3. *Would you be in favour of the proposal that a wife should be allowed to claim past maintenance not exceeding three years ?*

At present if a wife is expelled by the husband and she goes to live with her parents, the husband generally stops paying maintenance to her. Even if she and her children are compelled to live with her parents or she maintains herself and her children by earning a little money in some profession she cannot claim any past maintenance. The husband, therefore, resorts to various subterfuges so that the wife may not sue him. He feels that the longer the suit for maintenance is delayed the less will be the amount of maintenance that he will be compelled to pay. We propose that a wife should be able to claim past maintenance at least for three years prior to the institution of the suit for maintenance.

Question No. 4.

4. *Do you consider that if there is a stipulation in the* Nikahnama *the wife shall be entitled to claim maintenance for the stipulated period and not only for the period of* Iddat ?

This question was considered unnecessary by the Commission and was dropped.

GUARDIANSHIP OF PROPERTY

Question No. 1.

1. *Do you agree that in the absence of the father the court should appoint the mother as guardian of the property of her children, unless such appointment is considered detrimental to the welfare of the minor and the protection of the property ?*

At present the following persons are considered to be the legal guardians of the property of the minor :—

1. The father.
2. The executor appointed by the father's will.
3. Father's father.
4. The executor appointed by the will of the father's father.

It is only in the absence of the above mentioned legal guardians that the court has discretion to appoint any other person as guardian for the protection and preservation of the minor's property. It has been demonstrated in a number of cases that strict adherence to the above procedure very often leads to the destruction of the property which was meant to be protected. We, therefore, suggest that in the absence of the father, it should be open to the Matrimonial and Family Laws Court to appoint any person as guardian of the property of the minor, including a mother, if this is considered to be necessary for the protection and preservation of the minor's property. To give such a discretion to the court does not run counter to any injunction of the Holy *Qur'ān*. In modern times there are a number of mothers who would be in a position adequately to manage the property of their minor children. It must be remembered that if the mother mismanages the property, it is open to the court to remove her at any time from the guardianship of the minor's property. Moreover, she will have to submit an account of the income of the property to the court after every six months.

Question No. 2.

2. *Would you legislate that the guardian of the property of the minor shall have no power to sell or mortgage the property of the minor without the previous permission of the court ?*

The property of the minors was often embezzled by the guardians or exchanged for their own inferior property at the

time of the revelation, so the Holy *Qur'ān* uttered the following warnings :—

(١) ولاتاكلوا اموال اليتمىٰ الابالتى هى احسن - (٢) ان الذين ياكلون اموال اليتمىٰ ظلماً انما ياكلون فى بطونهم ناراً - (٣) تتبدلو الخبيث بالطيب - ولا تاكلوها اسرافاً و بداراً ان يكبروا -

"Do not spend anything on yourself out of the property of the orphans except in good faith and a commendable manner". "Those who embezzle the property of the orphans act as if they were swallowing the fire of hell". "Do not exchange your bad property with the good property belonging to the orphans and do not be extravagant about it".

The tendency alluded to in the verses quoted above is prevalent to a greater extent now than it was during the time of the Holy Prophet, that is why there is a consensus of opinion that legislation should be enacted that the guardians of the minors shall have no authority to sell or mortgage the property of the minors without the permission of the court.

INHERITANCE AND WILLS

Question No. 1.

1. *Would you suggest that if there are any parts of Pakistan where the* Shariat *Laws of inheritance do not prevail, immediate steps be taken to enact such legislation ?*

It is highly desirable, in the interest of our country, that uniformity in laws in respect of inheritance shall prevail amongst Muslims in all parts of Pakistan. If there are any parts of Pakistan wherein inheritance is regulated by Custom, it is time that Custom and Special Acts be replaced by the *Shariat* Law. We are not in a position to know precisely at this time whether there are any localities in East Pakistan, Baluchistan or elsewhere, where customary laws still prevail. After the repeal of all Customary Laws and Special Acts relating to inheritance, it should be laid down that no release of property by a heir shall be considered as valid, unless such release is made after the death of the testator and in the presence of a judge of the Matrimonial Court.

Question No. 2.

2. *In view of the complexity of Procedural Laws, would you be in favour of the proposal that whenever a woman is a plaintiff in respect of her rights of inheritance the ordinary Civil Court shall*

transfer such suits to the Matrimonial and Family Laws Courts for expeditious disposal?

The Commission is of the opinion that, in view of the complexity of Procedural Laws, all suits relating to inheritance shall be heard by a Matrimonial and Family Laws Court whether the plaintiff is a man or a woman. The expeditious disposal of suits relating to inheritance is necessary in order to protect the rights of mothers, sisters, daughters and orphans.

Question No. 3.

3. *Is there any sanction in the Holy* Qur'ān *or any authoritative Hadith whereby the children of a pre-deceased son or daughter are excluded from inheriting property?*

It was admitted by all the members of the Commission that there is no sanction in the Holy *Qur'ān* or any authoritative Hadith whereby the children of a pre-deceased son or daughter could be excluded from inheriting property from their grandfather. It appears that during زمانه جاهلیت this custom prevailed amongst the Arabs, and the same custom has been made the basis of the exclusion of deceased children's children from inheriting property of their grandfather. It may be mentioned that if a person leaves a great deal of property and his father has pre-deceased him, the grandfather gets the share that the father of the deceased would have got. This means that the right of representation is recognised by Muslim law amongst the ascendants. It does not, therefore, seem to be logical or just that the right of representation should not be recognised among the lineal descendants. If a person has five sons and four of his sons pre-deceased him, leaving several grand-children alive, is there any reason in logic or equity whereby the entire property of the grandfather should be inherited by one son only and a large number of orphans left by the other sons should be deprived of inheritance altogether. The Islamic law of inheritance cannot be irrational and inequitable. Moreover, as the right of representation entitles a grandfather to inherit the property of his grandsons even though the father of the testator has pre-deceased him, why can the same principle be not applied to the lineal descendants, permitting the children of a pre-deceased son or daughter to inherit property from their grandfather. There are numerous injunctions in the Holy *Qur'ān* expressing great solicitude for the

protection and welfare of the orphans and their property. Any law depriving children of a pre-deceased son from inheriting the property of their grandfather would go entirely against the spirit of the Holy *Qur'ān*.

It was stated by Maulana Ehtishamul Huq that all the four *Imams* are agreed that the son of a pre-deceased son or daughter shall be excluded from inheritance. The Maulana Sahib was not prepared to re-open this question in view of the unanimous opinion of all the *Imams*. The views of the Maulana Sahib would be elaborated by him in his note of dissent.

It has been suggested in some of the replies that the grandfather can, by will, leave one-third of his property to his grandchildren. This provision does not do full justice to the orphans as is evident from the example given above. We, therefore, recommend that legislation should be undertaken to do justice to the orphans in respect of the property of their grandfathers.

Question No. 4.

4. *Is it permissible to legislate that a Muslim may transfer property to anyone for life with the provision that thereafter the property shall revert to his own heirs?*

Question 4 was amended by the Commission to read as follows:—

"*Is it permissible to legislate that a childless Muslim may*

Note to Question No. 4.

۱- عمری - مالکیه کے نزدیک ایک چیز کسی کو عمر بھر کے لئے دی جا سکتی ھے - جس کے مرنے کے بعد وہ چیز دینے والے کو اگر وہ مر چکا ھو تو دینے والے کے ورثہ کو لوٹ جائے گی - اسے عمری یا اعمار کہتے ھیں اور یہ مالکیہ کے نزدیک نہایت مستحسن فعل ھے - حنابلہ اور حنفیہ سے اس کی کوئی تردید منقول نہیں - مالکیہ کے متعلق یہ عبارت ھے کہ عمری کرنے کے بعد - فاذا مات المعطیٰ (بالفتح) رجعت الدارملکاًللمعطی (بالکسر) ان کان حیاً لورثتہ من بعدہ ان کان قدمات (کتاب الفقہ ج۳ صفحہ ۴۰۸) یعنی اگر وہ مر جائے جس کو مثلاً گھر بطور عمری دیا گیا ھے تو وہ گھر دینے والے کی ملک ھو کر لوٹ آئیگا - اگر وہ زندہ ھے - اور مر چکا ھے تو اس کے ورثہ کو لوٹ آئے گا -

Imam Malik has said that a conditional gift may be made stipulating that it will revert to the donor if the donee dies during the life-time of the donor and to the heirs of the donor after the death of the donee.

transfer property to his wife for life with the provision that thereafter property shall revert to his own heirs?"

According to the Anglo-Muhammadan Law as it prevails at present, a childless proprietor cannot gift his property to his wife or bequeath it to his widow on the condition that after his death the property shall revert to his own heirs. A conditional gift to his wife or by will to his widow with the proviso that after her death the property shall pass to his heirs and not to her heirs is permissible according to the view taken by some revered Muslim jurists and it is more in accordance with equity. It is recommended that legislation may be enacted providing that a childless Muslim may transfer his property to his wife with a proviso that after her death the property shall revert to him, if he is alive, and to his heirs if he has pre-deceased the widow. A transaction of the type alluded to above is technically known as *"Umra."*

Question No. 5.

5. *Do you consider that the* Waqf 'Alal Aulad *Act, 1913,' should be amended and improved to enable the property to be sold or exchanged or dealt with otherwise to improve its value or use by permission of the court?*

The Commission is of the opinion that the *Waqf 'Alal Aulad* Act, 1913,' has out-lived its usefulness and that it should be repealed. This Act does not really benefit any educational or charitable institution and enables men of property to tie down the estate in perpetuity in such a way that by the lapse of time the entire property is ruined. The number of shares increase to such an extent that none of them takes interest in the protection and preservation of the property.

DISSOLUTION OF MARRIAGE BY COURT

Question No. 1.

1. *Should the grounds mentioned in section 2 of the Dissolution of Muslim Marriages Act be enlarged, restricted or amended in any manner?*

This question has already been answered when dealing with Question 1 of the section headed "Divorce Sought by the Wife."

Question No. 2.

2. *Should it be enacted that if a woman wants dissolution of marriage and in the opinion of the Court the fault lies with the husband, a divorce may be allowed without requiring the wife to part with* Mehr *or anything else which she may have received from the husband?*

It is unnecessary to enact that if a woman wants dissolution of marriage and in the opinion of the court the fault lies with the husband, a divorce may be allowed without requiring the wife to part with *Mehr* or anything else which she may have received from the husband. It has already been laid in section 5 of the Dissolution of Muslim Marriages Act, 1939, that if a woman secures a divorce through a court it shall not affect any right which a married woman may have under Muslim Law to her dower or any part thereof on the dissolution of her marriage.

Question No. 3.

3. *Would you make incompatibility of temperament a valid ground for divorce?*

The Commission is of the opinion that incompatibility of temperament should not ordinarily be regarded as a valid ground for divorce. If a woman wants a divorce on the ground of incompatibility of temperament she should take advantage of the provision relating to *Khula.* Apart from *Khula* we do not recommended that incompatibility of temperament should be made a valid ground for dissolution of marriage by court.

Question No. 4.

4. *Should the period of seven years' imprisonment mentioned in clause* (3) *of section 2 of the Dissolution of Muslim Marriages Act be reduced to four years?*

It was decided that the period of seven years' imprisonment mentioned in clause (3) of section 2 of the Dissolution of Muslim Marriages Act should not be reduced. It was, however, generally felt that some provision should be made for the dependents [sic] of the prisoner during the period that he is in prison. The Commission is of the view that if a person is sentenced to a long term of imprisonment, he should be paid some allowance for the labour that he performs in the jail. This amount should be paid to the dependents of the prisoner if they are in strained circumstances. The prisoners should be released every six months on parole to visit their wives and children, if it is possible to do so without incurring the danger of their not returning to jail at all after their period of parole.

MATRIMONIAL AND FAMILY LAWS COURTS

All the eleven questions in this section deal with the establishment and procedure of Special Courts which should be established for the expeditious disposal of suits relating to women's rights and other family laws. It is unnecessary to reproduce these questions verbatim as our replies relating to Matrimonial and Family Laws Courts would indicate the nature of the questions that have been dealt with in this section.

There is a consensus of opinion that the complexity of our Procedural Laws prevents a large number of citizens, specially women, from claiming their legitimate rights in courts of law. We have adopted English Procedural Law with its archaic, cumbersome and dilatory methods, and have failed to realize that the English Procedural Law is entirely unsuitable for our state of society. We have completely ignored Islamic, European and American achievements in this field, with the result that every civil suit, once started, lasts almost for a generation, and causes enormous waste of time and money. The decree of order obtained by a successful party often becomes a dead-letter when execution is taken out, as the procedure for the execution of decrees is so complex and antiquated that it enables a dishonest litigant to prolong proceedings to such an extent that the successful party terminates the process in disgust. It has often been remarked that involvement in a civil suit is the greatest misfortune that can befall a human being short of sickness and death. At present all cases relating to Marriage and Family Laws are tried in civil courts as ordinary civil suits. Married women, orphans, sisters and daughters are generally short of funds. The result is that the Shariat Act and the Dissolution of Muslim Marriages Act have become completely infructuous, and women have gradually realized that it is hopeless for them to institute civil suits in order to establish and secure their rights. No amount of beneficient [sic] legislation in favour of married women, widows, orphans, daughters and sisters is going to be of the least assistance to them if rights secured to them under such legislation are to be enforced by the ordinary civil courts. In order to find an effective remedy for this sorry state of affairs, this Commission makes the following recommendations:—

(1) One Matrimonial and Family Laws Court should be established in each Commissioner's Division to deal with cases relating to Marriage and Family Laws. This court should be presided over by an officer of the rank of a District and Sessions Judge.

(2) It should be definitely enacted that a Matrimonial and Family Laws Court shall not follow the Civil Procedure Code and the Evidence Act. These enactments should be entirely scrapped in respect of suits relating to Marriage and Family Laws. The Legislature should lay down a few fundamental principles for the guidance of Matrimonial and Family Laws Courts, and the remaining procedure should be regulated by simple rules framed by the High Court. The object should be to grant substantial and natural justice to the litigants in Marriage and Family Laws Courts and to dispense with all technicalities. "Legislative-made" procedure leads to an unwise division of responsibility for the administration of justice between the legislature and the law courts. The legislative-made practice and procedure is highly inflexible and that is the worst feature of our Procedural Laws. The advantages of judicial rule-making for the Matrimonial and Family Laws Court are obvious. As soon as the court finds that certain rules hinder expeditious disposal, these rules can be modified or eliminated. Eighteen States in the United States of America have delegated complete supervisory rule-making powers to the highest courts of those States. It has been provided in the authorization of rule-making powers that the rules of court shall not make any changes in substantive laws and rights but shall be confined merely to Procedural Laws. This provision is sufficient to safeguard the rights and liberties of the subject.

(3) The next reform that this Commission would suggest is that the right of second appeal and revision should be entirely taken away so far as decisions of Matrimonial and Family Laws Courts are concerned. During the Mughal period no litigant was allowed to prefer more than one appeal from an adverse decision and no remands were allowed. Once a decision was given at the appellate stage it was final and conclusive as between the parties. As the presiding officer of a Matrimonial and Family Laws Court would be a person of the rank of a District and Sessions Judge, an appeal should lie against his decision directly to the High

Court, and the decision of the High Court should be final and conclusive. Suits relating to human relationships must be expeditiously decided, and it is infinitely better to take the risk of an erroneous decision in one in a hundred cases rather than to allow a hundred suits to drag on indefinitely until the man and the woman involved therein are either dead or too old to reap the benefit of the litigation. All human courts are likely to go wrong sometimes, and even if as many as five appeals are allowed in five different forums, the final court of appeal will still be reversing some decisions of the court immediately below. Finality of an appellate judgment at the earliest possible time is conducive to the welfare of the subject in a far greater degree than avoidance of a possible mistake in one out of a hundred cases.

(4) It should be enacted that every suit in a Matrimonial and Family Laws Court shall be decided within a period of three months. Some persons who are fully acquainted with the intricacies of modern Procedural Law would consider this to be an impossible accomplishment. This objective was, however, fully realized in pre-war Austria and litigations with even two appeals were finally determined within six months. Some indications may be given as to how it can be accomplished :—

(a) Whenever a suit is instituted personal service should be effected by means of a registered letter simultaneously with substituted service by advertisement in the press. The despatch of the registered letter by the court and advertisement in the press shall be taken to be conclusive proof of the fact that the defendant has been informed of the suit pending against him.

(b) The plaintiff shall be required to submit copies of his entire documentary evidence and a precis of his oral evidence in typed form with the plaint. The defendant shall be required to submit a written statement and also attach therewith typed copies of his entire documentary evidence and a precis of his oral evidence.

(c) The judge after studying the record and the evidence of both the parties should hold a pre-trial hearing where the entire dispute should be discussed in an informal manner with the parties. Efforts should be made by the judge to induce both parties to abandon all frivolous and unnecessary objections.

Thereafter the judge should frame one or two basic and central issues for trial.

(d) Formal proof of all documents should be eliminated. If any party insists on the production of the original when the judge is of the opinion that there is no reason to doubt the authenticity of the copies, the party so insisting should be burdened with heavy costs.

(e) The examination of the witnesses, as it is prevalent at the present time, is done in a most unsatisfactory manner. After the court has studied the whole case the witnesses whose testimony is necessary should be called as court witnesses. Everyone should be given a chance to give his deposition in his own words without unnecessary interruption. The judge should examine the witnesses and after he had done so regarding the main facts of the case the lawyers of the parties, if they appear, should be allowed to ask additional questions to bring out the facts more clearly. Substance should not be sacrificed to form and an effort should be made to make the proceedings intelligible to the parties concerned.

(f) The suggestions made above should be embodied in the rules framed by the High Court with the express purpose of expediting the disposal of the cases in Matrimonial and Family Laws Court. The court shall be given large discretionary powers to regulate its own procedure to suit the circumstances of each case. It must be remembered that expeditious disposal does not mean summary disposal, the trials in Matrimonial and Family Laws Court would he expeditious but not summary.

The trials in Matrimonial and Family Laws Courts should be made as cheap as possible. We, therefore, propose that no court-fee and other charges shall be payable in such courts. No frivolous or vexatious litigation is likely to result by abolishing the court-fee as cases concerned with human relationships stand on any entirely different footing from suits in respect of lands, houses and other property.

In cases relating to matrimonial matters, it is suggested that one male and one female adviser shall be associated with the judge. The female adviser shall be chosen by the wife and the male adviser by the husband. These advisers will stand on an

entirely different footing from the assessors in session cases. The experiment of assessors has no doubt been a failure. We, therefore, do not recommend the appointment of assessors chosen by the court.

In order further to reduce the cost of litigation in Matrimonial and Family Laws Courts we recommend that the presiding officer of the court shall hold a session of the court in each district headquarters by turn. We further recommend that the parties should be allowed to be represented by agents or relations and not necessarily by legal practitioners.

The orders and decrees of Matrimonial and Family Laws Courts should not be executed in the same manner as orders and decrees of ordinary civil courts. All moneys payable by any party as a result of an order of a Matrimonial and Family Laws Court shall be realizable as arrears of Land Revenue. Obedience to other orders shall be enforced by the court by committing the defaulting party to imprisonment for contempt of court. Summary powers to punish for contempt of court should be conferred on the Matrimonial and Family Laws Courts on the same basis as they vest in the High Courts.

We do not consider it feasible to recommend that all cases where a woman is a plaintiff shall be cognizable by the Matrimonial and Family Laws Court. We consider that women and men shall be placed on an equal footing in this respect. All cases relating to Matrimonial and Family Laws shall be heard and decided by special courts as suggested above, irrespective of the sex of the parties.

SUMMING UP

Having dealt with specific questions in detail we would like to make some concluding remarks to indicate that we have always kept the injunctions of the Holy *Qur'ān* and the *Sunnah* in view in proposing certain reforms. We have given no new rights to women. An effort has been made to provide machinery for the implementation of rights that have already been granted to women and children by the Holy *Qur'ān* and the *Sunnah*. In doing so we have been guided by the following considerations :—

1. The State is the custodian of social justice.

2. The actual state of the socio-economic pattern has changed considerably since the early centuries of Islam.

3. The basic principles of human relations as enunciated by the Holy Book are valid for all times, but the mode of their implementation and application must vary along with the changing circumstances.

4. The law and procedure about marriage, divorce, guardianship of the person and property of the minors and inheritance needs overhauling to create greater security and stability in family relations, and to help the helpless.

5. The interpretations of the revered jurists have to be studied again in the light of expanding human knowledge and widening experience, and a reconstruction in the light of the spirit of the *Qur'ān* and *Sunnah* is not only permissible but is a duty imposed on the Muslims to make Muslim society adaptive, dynamic and progressive.

6. Special social diseases require special remedies, and if any thing that was permitted by Islam because human society was yet in an early stage but not enjoined, has resulted in the abuse of a permission, the permission is to be hedged in again with conditions and restrictions that may tend to minimize the prevalent abuses.

7. Unregistered marriages and unregistered divorces create an immense amount of unnecessary and avoidable litigation. In former times when literacy was not more than one per cent. in any society in the world, there was some practical difficulty in reducing all marital and commercial contracts to writing. But now that the percentage of literacy is fast increasing and in every village there are either some petty officials or private citizens who can read and write, the injunction of the Holy *Qur'ān* to reduce some important transactions to writing can be extended to the registration of marriages and divorces so as to dispense with mere oral evidence in such vital matters which besides other things involve the question of legitimacy and inheritance. Legal and judicial experience covering numerous cases points towards this reform that cannot brook any delay. When the law has already made it compulsory that minor affairs connected with agricultural transactions even in the most backward areas must be reduced to writing and recorded officially in

an official register, there seems to be no justification for keeping the most vital matter of marriages and divorces as an exception to the general rule. The demand for registration in this matter is only a further implementation of the Quranic injunctions. Unfortunately Muslim society in general has become irresponsible in such vital concerns of life. The State, therefore, has to step in to enact measures that prevent abuses that are so rampant. It will be noted that the recommendations of the Commission have nowhere violated the basic injunctions of the *Qur'ān* and *Sunnah* and every reform proposed embodies only in a slightly modified form the spirit and trends of original and unsullied Islam.

8. With respect to polygamy which has become a hotly debated issue in every Muslim society, the Commission has adhered to the Quranic view. Polygamy is neither enjoined nor permitted unconditionally nor encouraged by the Holy Book, which has considered this permission to be full of risks for social justice and the happiness of the family units, which is the nucleus of all culture and civilization. It is a sad experience for those who have practised it and for those who have watched its tragic consequences that in most cases no rational justification exists and the practice of it is prompted by the lower self of men who are devoid of refined sentiments and are unregardful of the demands of even elementary justice. The Quranic permission about polygamy was a conditional permission to meet grave social emergencies and heavy responsibilities were attached to it, with the warning that the common man will find it extremely difficult, if not impossible, to fulfil the conditions of equal justice attached to it. The members of the Commission, therefore, are convinced that the practice cannot be left to the sweet will of the individual. It is thoroughly irrational to allow individuals to enter into second marriages whenever they please and then demand *poste facto* that if they are unjust to the first wife and children the wife and children should seek a remedy in a court of law. This is like allowing a preventible epidemic to devastate human health and existence and offering advice to human beings to resort to the medical profession for attempting a cure. Great evils must be nipped in the bud and prevention is always more rational and more advisable than cure. The Commission is conscious of the fact that in rare cases taking of a second wife

may be a justifiable act. Therefore it recommends that it should be enacted that anyone desirous of taking a second wife should not be allowed to do it without first applying to a Matrimonial Court for permission. If the court sees any rational justification in the demand of such a husband he may be allowed only if he is judged to be capable of doing justice in every respect to more than one wife and the children. To ask the first wife and her children to resort to a court for the demands of justice is unjust and impracticable in the present state of our society where women, due to poverty, helplessness, social pressure and suppression are not in a position to seek legal assistance. The function of the court is not merely to remove injustice when it is done. In our opinion a more vital function of the legal and the judicial system is to adopt measures that minimize the practice of injustice. Therefore, permission of the Matrimonial Court for a contemplated second marriage so that the demands of justice are fulfilled and guaranteed, is the fundamental reform proposed by the Commission.

9. The Commission has also been guided by the conviction that beneficient [sic] legislation alone does not constitute a guarantee of human justice and welfare unless the procedure to obtain justice is simple, speedy and inexpensive. In a just society justice is not to be sold but should be free as air and water. Justice delayed is justice denied. Therefore, the proposal to establish special Matrimonial Courts, not burdened with all sorts of civil work and not entangled by the complexities of the current civil procedure code, is as important as the other legal reforms that have been proposed. Some eminent lawyers who have practised in some Muslim countries have stated that suits connected with matrimony and family affairs are decided in the courts within a very short time. They do not take months or years as is the case at present with us.

Islam very justly claims to be a simple and liberal creed, and apart from a very few categorical injunctions, adumbrated in broad outline its basic principles, aspirations and trends, are based on natural and substantial justice. The *Qur'ān* says that previous societies perished because they were burdened with too much inflexible law and too much unnecessary ritual, which the Holy Book has stigmatized as chains and helters. Life is a

creative and adaptive process and it requires more of vision and less of inflexible rules. The original simple and liberal spirit of Islam must be revived and for guidance we have to go back to the beginning of Islam when it was yet free from accretions. Later multiplications of laws and codes may be studied as facts of historical importance, but can never be identified with the totality of Islam. As the great sage-philosopher of Islam Allama Iqbal said, 'Islam is more of an aspiration than a fulfilment,' meaning thereby that its implementation at any epoch of history in any particular socio-economic pattern is only a moment in the dialectic of its history. No progressive legislation is possible if Muslim assemblies remain only interpreters and blind adherents of ancient schools of law. All real evolution is a creative process which could never be identical with mere repetition. It is an oft-repeated taunt of the unreflective and prejudiced critic that Islam has been bypassed by the all-round progress of humanity, but no enlightened Muslim can plead guily to the charge. Islam is another name of the eternal principles of life whose validity is not touched by the historical vicissitudes to which all nations are subject. It is not Islam but the temporal regulation of human relations that suffers a constant change. Even while the *Qur'ān* was being revealed, the alteration of circumstances was matched by alteration of some injunctions. History of early Islam is full of such instances. Who can say that human life has ceased to change and grow and has not made much of ancient law already obsolete that was once necessary for the direction of human affairs.

Slavery is an instance in point. With the abolition of this nefarious institution a large body of time-honoured Muslim law has become a dead letter. As humanity takes further strides towards social justice many other institutions shall be scrapped by the advance of time. To hold back Islamic society by making it conform in detail to patterns that prevailed at one time, but have lost all meaning now, is the surest way to make society dead or decadent.

It will be noted that in the Questionnaire issued by the Commission and the final recommendations made by it, the primary object was to revive in a slightly modified form the rights granted to women by Islam, the rights to obtain which

the women of some highly civilized countries are still struggling. Islam gave women complete economic independence; she inherits from all sides and all her property inherited or earned is her own. Islam made marriage a civil contract by which the woman could ensure all the security she desired. She could obtain equal right of divorce. She could demand dissolution of marriage by bringing in proof of the incapacities of a husband for marital life or mental or physical cruelty or ill-treatment. She could demand a divorce by merely expressing her unwillingness to live with a husband on the condition that she foregoes the whole or part of her *Mehr*. She could claim equal justice in every respect from a husband who has taken a second wife. This is the original Islamic law which was embodied in the *Qur'ān* or derived from the *Sunnah*. But due to the rigidity of juristic orthodoxy and owing to ignorance or economic dependence of women the liberal aspects of marriage and family laws were either relegated to the background or become impracticable because of the complexity of procedure of our law courts.

The Commission has proposed no new rights for women which the *Qur'ān* and *Sunnah* had not already granted them; it has proposed only to implement those rights and make them more secure by a better procedure, and in some cases the Commission has preferred the injunctions of the *Qur'ān* and *Sunnah* to the interpretation of the later jurists whatever be the degree of their agreement or disagreement because none of them professed to be infallible. As in science, so in the history of law, sometimes even the unanimous opinion of the savants of a particular epoch is no guarantee of its truth or validity.

In conclusion we would like to point out that all the reforms suggested in this report are not so interlinked that either all of them should be adopted or they should be dropped in their entirety. The establishment of special Matrimonial and Family Laws Courts is long overdue, and legislation should be undertaken immediately to bring such courts into being for the expeditious disposal of cases relating to Marriage and Family Laws. This measure will remove the majority of the grievances of the women at a single stroke and enhance social justice as envisaged by Muslim Law.

The second measure which should be adopted at once is to

enact that (a) no person can marry a second wife in the lifetime of the first without the intervention of a Matrimonial Court, and (b) that no person shall be able to pronounce a divorce, without obtaining an order to that effect from a Matrimonial and Family Laws Court. We have made particular mention of these two measures as we consider that legislation introducing gradual reformation would be easier of enactment than a large complicated Code. In India the original Hindu Code as recommended by the Hindu Code Committee had to be split up into several portions and various enactments had to be passed at intervals to give effect to the various provisions thereof.

In the words of Allama Iqbal, "the question which is likely to confront Muslim countries in the near future, is whether the Law of Islam is capable of evolution—a question which will require great intellectual effort, and is sure to be answered in the affirmative; provided the world of Islam approaches it in the spirit of Omar—the first critical and independent mind in Islam who, at the last moments of the Prophet, had the moral courage to utter these remarkable words: "The Book of God is sufficient for us". May the Islamic Republic of Pakistan justify its name by reverting to the original, dynamic, liberal and creative spirit of Islam.

Chapter 4

A CRITIQUE OF THE MODERNIST APPROACH TO THE FAMILY LAW OF ISLAM

By

MAULANA AMIN AHSAN ISLAHI

The Report of the Marriage and Family Laws Commission is an important document and is a challenge to the contemporary Muslim thought. This challenge has been forcefully met by the Muslims of Pakistan and several rejoinders to it have been written by Muslim thinkers. The view-point of the renaissant forces of Islam was ably presented by Maulana Amin Ahsan Islahi. The translation of the said rejoinder (with a few abridgments here and there) is given here. The author, in this article, has given a critical appraisal, not only of the Report of the Commission but also of the entire modernist approach to the problem of legal reconstruction. He has also given a positive exposition of the Marriage Law of Islam.—*Editor*.

IN AUGUST 1955 the Government of Pakistan appointed a Commission consisting of seven persons to survey 'the existing laws governing marriage, divorce, maintenance and other ancillary matters among Muslims' and to report as to what modifications are required in them 'in order to give women their proper place in society according to the fundamentals of Islam.' The Commission were also asked 'to report on the proper registration of marriages and divorces, the right to divorce exercisable by either partner through a court or by other judicial means, maintenance and the establishment of Special Courts to deal expeditiously with cases affecting women's rights.'

The Commission submitted their Report to the Government of Pakistan which was subsequently published in the Gazette of Pakistan dated 20 June 1956. One from out of the seven members of the Commission, namely Mr. Enayat-ur-Rahman, took practically no part in the deliberations of the Commission, yet the Report had had his consent and approval. Maulana Ehteshamul Haq has written a note of dissent which not having been received up till the time of the publication of the Report, could not be included in the Report of the Commission. It was, however, promised that it would be published as a supplement soon after it was received.[1] In this manner the Report of the Commission can be regarded as practically the joint product of the mental efforts of (the late) Khalifa Abdul Hakim, the three Begums and the President of the Commission.

IMPORTANCE OF THE REPORT

THIS Report is important in many respects and it would be pertinent to point out some of them here.

First, if the recommendations of this Report are accepted, the present structure of our social life will undergo a radical change. All those foundations upon which Islam has established our social system will be destroyed and with them will also go all those traditions—good as well as bad—which are generally held in respect and veneration.

1. The Note of Dissent of Maulana Ehteshamul Haq was published in the Gazette of Pakistan (Extraordinary) dated 30 August 1956.—*Editor.*

Secondly, the acceptance of the Report will not affect any one particular section of our population. Its consequences, whether good or bad, will affect the fate of every citizen of this country. The rich and the poor, the townsmen and the village-folk, the cultured and the uncultured, men and women, the virtuous and the wicked—all will have to garner its fruits. They are all bound to be affected by its consequences. Its far-reaching effects will not spare our social institutions which have been evolved to meet the various needs of society. And, ultimately, the State itself will be affected and will have to succumb to an orientation which will be entirely different from the one envisaged in the Constitution of the country.[1]

Thirdly, the Report has put forward some new concepts and theories and has presented some new principles of *Ijtihād* about which we have hitherto been quite in the dark. No trace of them is found in the vast store of legal and theological literature that we have inherited from the illustrious scholars, legists and jurists of Islam.

Acceptance of the recommendations of the Report would automatically imply that we endorse and accept those concepts of religion and those principles of *Ijtihād* which form the bed-rock of the recommendations and whence they ensue. If these novel and new-fangled principles are accepted, it would not only reduce the vast theological and juristic literature of Islam, which has been accumulated in the last thirteen centuries, to a meaningless record of the past, having no relevance to the present, but will also relegate the Qur'ān and the *Ḥadīth* to ignominous insignificance.

Fourthly, this Report is a revealing document, for it is the first document since the enforcement of the new Constitution of the country which gives an idea of the pattern of 'Islamic life' as envisaged by our rulers and like-minded people. It also gives some glimpses of the future that is to come—the real worth of the guarantee that Islamic laws will be enforced, that the existing un-Islamic laws will be replaced by Islamic ones, that a commission will be appointed to suggest the stages for the enforcement

1. All references to the Constitution relate to the Late Constitution of 1956. It should be kept in mind that the article was written before the abrogation of the Constitution in October 1958.—*Editor.*

of these laws. This Report throws ample light on all these problems.

Because of these multiple aspects, the Report calls for a thorough and detailed analysis instead of a mere cursory glance. For, if the Report is really impregnated with the consequences I have pointed out above, we must seriously think how to counteract its monstrosities.

SCHEME OF THE ESSAY

I, THEREFORE, propose to present my detailed observations on this Report. This essay will consist of five sections. In the first part, I propose to discuss the nature of the Commission in the light of the basic object that has prompted the formation of the Commission. In the second part, I intend to show the position of the Commission in the light of the present Constitution of Pakistan. In the third section, I would like to view the hitherto unheard-of concepts and principles of *Ijtihād*. Then I will discuss in detail the recommendations of the Commission and try to examine how far they are in consonance with the Qur'ān and the *Sunnah* and also how far they are in harmony with the demands of the present-day needs and condition of our people. I will also try to point out the consequences that may ensue if these recommendations are accepted.

In the last section, I propose to survey the real ailments and maladies that infect our social life and to suggest ways and means to eradicate those evils, because all this discussion would remain fruitless and sterile if it is confined to a mere exposition of the shortcomings of the Report. The problems which stare us in the face must be met and solved courageously and intelligently. I shall offer my own suggestions in this respect.

I. WAS THE COMMISSION QUALIFIED FOR THE TASK?

THE purpose of this Commission, as stated earlier, is to suggest (after a survey and scrutiny of the current family laws) whether, from the view-point of the rights of women, there is any need of reform and change in these laws. If so, what should be the nature and content of the reform?

It is common knowledge that our present family laws are more or less the same as were introduced in India as Muhammedan Law by our erstwhile British rulers.[1] As the overwhelming majority of the Muslim population of this country adheres to the Ḥanafī school of *Fiqh*, naturally the Muhammedan Law enforced here was based on *Fiqh-e-Ḥanafī* and the authentic books of *Fiqh-e-Ḥanafī*, viz. *Hidāya*, *Fatāwā-i-'Ālamgīrī*, *Sirājī*, etc., were used as the source-books of this law.[2] These books, at the instance of our foreign rulers, were translated into English and were used for purposes of reference in all legal and judicial matters.

The learned members of the Commission hold that the tying down of Muslims to the Muhammedan Law was a trick and a stratagem played by the Britishers to fossilise our society. As a result of this, our society became static and could not progress according to the changing circumstances. They say:

'Like the Romans the British adopted the policy of non-interference in the personal laws of the different religious communities and so the Muslims in this respect were ruled by what is called Anglo-Muhammedan Law. Muslim Law, thus introduced, ceased to be a growing organism responsive to progressive forces and changing needs. What was accepted as the personal law of the Muslims was conservative, rigid, and in many respects undefined, but owing to political subjection any liberalisation or reconstruction was well-nigh impossible.'[3]

I fail to understand the cause of this tirade against the Britishers. Is it directed against them because, while they subjected every department of Muslim life and society to their own 'progressive' laws, they left the domain of the personal law untouched? Why did they not introduce their progressive laws in this realm too, so that the 'rigid and conservative' Muslim personal law could be done away with for good? Or is it so because they adopted such 'rigid and conservative' books as *Hidāya*, *'Ālamgīrī* and *Sirājī* as reliable and authentic for all judicial matters and they did not appoint a commission consisting of some ultra-modern persons to amend and revise them? Or are the learned members of the Commission affronted by the blind imitation

1. Perhaps in 1772 A.C.
2. For the *Shi'ah* sect the famous book *Sharail al-Islām* was used as the source-book.
3. *The Report*, p. 1203.

of the Romans by the Britishers in pursuing the conservative and reactionary policy of the preservation and protection of the personal laws of religious communities? Whatever be the cause of this wrath and fury of the members of the Commission, I am of opinion that it is unjustified and uncalled for. None was more eager than the Britishers to establish the western mode of life in every sphere of our activity and in every aspect of our life. And had they been successful in accomplishing this, we admit, the task of this Commission would have been very much facilitated or perhaps we would have achieved those heights of 'progress' for which these people are aspiring to-day! But the Britishers were more cautious and careful than some people think. They wanted to rule over this country and they knew fully well the complexities and intricacies of the situation. They realised that their political brigandage and imperialistic usurpation of the country might be forgiven or forgotten, but if they tried to change the personal law of the peoples by means of coercion, this would never be tolerated.

Personal law is that last valuable which helps a people preserve their separate entity. If this too is destroyed, they lose everything. The preservation of personal law means that the community has preserved its entity, and when this is destroyed its very existence is endangered. That is why every nation fights to the last to protect her personal law and considers no sacrifice for this cause to be too great. And it is because of this peculiar position of personal law that even the most despotic rulers have willy-nilly respected it. If the Romans did respect the personal law of their people, it was not because they wanted to see their society 'rigid and conservative,' as the learned members of the Commission have tried to make us believe, nor did the Britishers guarantee our personal law because they wanted us to remain tied to the apron-strings of some unprogressive, outmoded books of *Fiqh*. On the contrary, the actual reason was what we have set out above. The Britishers knew that a Muslim's attachment to his personal law is of a deeply religious and emotional character. If they were to try to change that too, they would invoke a great danger to their political power. Personal law is the minimum that has got to be guaranteed for every community and it was the realisation of

this fact that made the Britishers to concede to it.[1] In Bharat, where even the life and property of the Muslims is in perennial danger, their personal law has been guaranteed at least in the Constitution. In our own Constitution we have provided for sufficient guarantee to respect personal laws of the minorities. Has this been done to keep their society 'rigid and conservative' and to rob them of progress and dynamism? The fact is that every system of life, secular or religious and ideological, has got to provide for the protection of the personal law and this is so because people are very sensitive in this respect and no encroachment on this field can ever be brooked or tolerated.

The observation of the Commission that what the Britishers adopted under the name of Muslim Personal Law was rigid, conservative, reactionary and unprogressive, too, is absolutely baseless. Muhammedan Law was based on *Hidāya* and *'Alamgīrī* and, in respect of the problems of inheritance, on *Sirājī*. These are the most reliable and most authentic books of Ḥanafī *Fiqh*. They were used by Muslim governments of India as the source-books of law. Naturally, when the Britishers conceded to maintain the Islamic law in the domain of personal life, they relied upon those works which were already held authentic by the Muslims. You may call these books by as many bad names as you like, but when the Britishers accepted them as the source-books of Muhammedan Law, nobody could dare to pass any such remarks about them. Even to-day *Hidāya* is regarded as one of the most authoritative sources of *Fiqh-e-Ḥanafī*. It is indispensable for every student of Islamic law. I do not know whether the members of the Commission know anything about this book or not, but I presume that the learned President of the Commission must have read it—at least through Hamilton's translation of it. He must also be

1. To illustrate this point, let us refer to one instance only. The *Mussalman Wakf Validity Act of 1913* (*VI of 1913*) was passed because of a ruling of the Privy Council in *Abdul Fata Muhammad vs. Rasamaya* (1894) 22 *cel*, 619: 21*A* 76) which outraged the Muslim law. This engendered great dissatisfaction in the Muslim community of the Indo-Pakistan sub-continent and to cool down the dissatisfaction and the protests which were becoming louder and louder, the above-mentioned law was passed. Later on it was held in several cases [e.g. *Khajah Solemehman vs. Sir Salimullah* (1922), *Bala Mal vs. Atta Ullah Khan* (1927) etc.] that the Act had no retrospective effect. This again generated resentment and led to the passing of the *Mussalman Wakf Validating Act* (*XXXII of 1930*).—*Editor.*

aware of the opinion Hamilton has expressed about this important treatise on law. I presume the ex-Chief Justice of Pakistan is well aware of the opinion of the late Justice Mahmud, who was a great genius in law and one of whose calibre it is hard to find to-day, which he expressed about this great book. *Fatāwā-i-'Ālamgīrī* is not the product of a solitary brain. It was compiled at the instance of Muḥammad Aurangzeb 'Ālamgīr, the sixth Emperor of the Mughal dynasty, in the eleventh century (*Hijrī*) by a board of renowned *'Ulama* and legists of the country, with the purpose of codifying Islamic law for the use of the courts. Although the book could not be edited on modern lines, it has nevertheless been used as an important and authentic source-book of Ḥanafī *Fiqh* by rulers as well as legists and jurists of the country. So is the case with *Sirājī*. There is no better compilation on the law of inheritance than this brief, precise, accredited and trustworthy treatise. The Britishers based the Muhammedan Law on these very books and even to-day it is these that constitute the authoritative works of *Fiqh-e-Ḥanafī*.

I do not deny that the Muhammedan Law, which the Britishers enforced, was lacking in so many respects. I also admit that a revision and re-evalution of the books of *Fiqh* is over-due. Had the Muhammedan Law been based on the original sources of Islamic law, viz. the Qur'ān and the *Sunnah*, and the books of *Fiqh*, too, be assessed on this very touchstone and be recast in their light to cater to our needs, it would have been ideal. And if it was not done on that occasion, *it must be done now*. Noboby can deny the very pressing need for the re-evaluation of the literature of Islamic law and its codification to meet our present needs.[1] But our objection is that the Commission, which was entrusted to perform this important task, was the least qualified for this sort of work.

The task before the Commission was not that our family laws had become rigid and obsolete and had to be changed by those

1. For a detailed discussion on this point the reader is referred to Abul 'Ala Maudoodi, *Islamic Law and Constitution*, ed. Khurshid Ahmad, Islamic Publications, Ltd., Lahore, 1960, Ch III; Amin Ahsan Islahi, *The Problem of Legal Differences in an Islamic State* (Urdu), Chiragh-e-Rah Publications, Karachi, pp. 113-151, and Khurshid Ahmad (ed), *Chiragh-e-Rah*, "Islamic Law Number," Vol. II.—*Editor.*

prevalent in the so-called progressive countries of the world. Had this been the objective before the Commission, we would have had no objection in regard to its personnel –for this Commission could perform that task quite admirably. But the task before the Commission was quite different. They were entrusted with the delicate and important work of a critical scrutiny of *Fiqh-e-Ḥanafī* and its revision and reform. They were enjoined to correct the mistakes and failings of *Hidāya* and *'Ālamgīrī* and *Sirājī*. In fact, they were charged with the work of re-evalution and re-enunciation of some of the fundamendals of Islamic *Fiqh*. Every Tom, Dick or Harry cannot perform this task. It is a work to be done by only those who are well versed in the Qur'ān and the *Sunnah*, who have fathomed the depths of the Divine Commandments, who are conversant with the entire structure of Islamic law and civilisation, who know the real nature and purport of Islamic laws and injunctions, who are qualified to exercise *Ijtihād* and *Qiyās* and have such an insight in the *Sharī'ah* that they can judge the *Ijtihād* and *Qiyās* of the jurists of the past—including such eminent legists as Imam Abū Ḥanīfa, Imam Mālik, Imam Shāfi'ī and Imam Aḥmad ibn Ḥanbal—on the touchstone of the Qur'ān and the *Sunnah*, and who can show the weakness of a legist of the past in regard to any problem and support their own *Ijtihād* with strong arguments from the *Sharī'ah*. Can anybody say that even one member of the Commission was qualified to perform this task? The question of their being qualified for this job apart, can it be said with confidence that they had read, not to mention the original books of Islamic law—*Hidāyah*, *'Ālamgīrī*, *Sirājī*, etc.—even the English translations by Hamilton, Sir William Jones and Neil B. Baillie? Have they even one of them produced any treatise on the Qur'ān, *Ḥadīth* or *Fiqh*? Have they done any research on Islamic law and written any book on it—nay even any article worth the name? Have they even read all the thirty chapters of the Qur'ān and ever laboured to understand the scheme of life and things it envisages? If the answer to all these questions is in the negative —and an honest answer cannot be but in the negative—then is it not a fact that to-day Islamic *Sharī'ah* and Islamic *Fiqh* are the worst treated sciences of the world? Can any more shabby treatment be imagined in regard to a branch of learning that those who

do not have even the elementary knowledge of that subject should be entrusted with the task of its revision and amendment and that they should actually dare to assail it with their untutored pen?

2. THE POSITION OF THE COMMISSION IN THE LIGHT OF THE CONSTITUTION OF PAKISTAN

The Commision on Marriage and Family Laws was formed under an announcement of the Government of Pakistan dated 4 August 1955. Since then, a very basic and fundamental change has occurred in the country. On 23 March 1956, the new Constitution was put into force. With the adoption of this Constitution anything repugnant to it stands automatically annulled. My study of the Constitution has convinced me that after 23 March 1956, this Commission has lost all legal sanction. Article 198 of the Constitution reads as under:

(1) No law shall be enacted which is repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah, hereinafter referred to as Injunctions of Islam, and existing law shall be brought into conformity with such Injunctions.

(2) Effect shall be given to the provisions of Clause (1) only in the manner provided in clause (3).

(3) Within one year of the Constitution Day, the President shall appoint a Commission:

(*a*) to make recommendations:

(*i*) as to the measures for bringing existing laws into conformily with the Injunctions of Islam; and

(*ii*) as to the stages by which such measures should be brought into effect; and

(*b*) to complete in a suitable form, for the guidance of the National and Provincial Assemblies, such Injunctions of Islam as can be given legislative effect.

The Commission shall submit its final report within five years of its appointment, and may submit any interim report earlier. The report, whether interim or final, shall be laid before the National Assembly within six months of its receipt, and the Assembly after considering the report shall enact laws in respect thereof.[1]

1. The Constitutlon of the Islamic Republic of Pakistan, Part XII, Article 198.

A careful perusal of this provision of the Constitution reveals the following:

(1) The Constitution explicitly lays down that the Islamic laws can be given legislative effect 'only in the manner provided in clause (3).' Similarly, this procedure *alone* shall be followed in bringing the existing law in conformity with the Islamic injunctions.

(2) No Commission other than the one to be appointed by the President is entitled to do the job and if any Commission proceeds with the task it would be in contravention of the Constitution.

(3) The function of the Commission which is to be appointed by the President would be to suggest measures for bringing the existing law into conformity with Islam, to lay down the stages by which such measures should be adopted and to compile in suitable form such injunctions of Islam as can be given legislative effect.

(4) No encroachment will be made upon the personal law of any Muslim sect and nothing contrary to their accepted interpretations will be thrust upon them. The Explanation to Article 198 says: *'In the application of this Article to the personal law of any Muslim sect, the expression "Qur'ān and Sunnah" shall mean the Qur'ān and Sunnah as interpreted by that sect.'*

Now, what is the position of the 'Commission on Family Laws'? An analysis of the relevant facts brings out the following significant points:

(*a*) This Commission was not appointed by the President in pursuance of Article 198 of the Constitution, but was appointed by the Government *before* the Constitution was enacted.

(*b*) The terms of reference of this Commission are widely different from those laid down in the Constitution.

(*c*) This Commission has mercilessly assailed the personal law of different Muslim sects despite the fact that the Constitution has guaranteed that in respect of the personal law of the sects only that interpretation of the Qur'ān and the *Sunnah* will be held valid which is upheld by that sect.

The above discussion makes it clear that after the enforcement of the new Constitution the Commission lost its legal validity. One wonders why the Government continued to fritter away public money on a Commission which was against the Constitution. And if the Government was not alive to this, why did members of the Commission connive at this waste of money and energy on a vain pursuit? Or was it so because the knowledge of the members of the Commission about their Constitution is as 'deep' and 'thorough' as it is about the Qur'ān and the *Sunnah*? Or had the holy mission of amending and twisting and reforming Islam so overwhelmed them that they did not even care to turn their eyes to so obvious a thing?

3. TOWARDS A NEW-FANGLED ISLAM

THE Report is prefaced with a lengthy introduction and carries a 'summing up' which enshrines the Commission's novel and new-fangled concept of Islam and its new principles of *Ijtihād*. These concepts and these principles are extremely significant on many counts. First, they constitute the bed-rock of the recommendations which are, in fact, only a projection and application of these novel ideas and principles. Therefore, consideration of the recommendations should well be preceded by an appraisal of these underlying principles. Secondly, a consideration of these concepts will reveal the difference between the accepted view-point in regard to Islam and the new and novel modernist approach to it. Lastly, they show that the real problem which confronts our 'reformers' is not merely that of a reform of the marriage laws, but of the 'reform' and 'revision' of the entire Islamic ideology, and this Report is only the first step in that direction. Hence I deem it extremely important to examine these concepts carefully before I embark upon a discussion of the recommendations of the Commission. But I would not hesitate to make one observation at the very outset. The members of the Commission have not frankly expressed their views; instead, they have tried to present them in a roundabout way. They speak of the eternal principles of Islam—its dynamism, rational character and progressive outlook. They shower praises at the universal message of Islam and its historic mission. After creating this beautiful smoke-screen of words, they propound their new-fangled principles of *Ijtihād*. I wonder whether this attitude has been adopted merely to present

their concepts under an acceptable guise, so that the people may not get affronted at their very first assault, or whether these people suffer from some mental confusion which makes them blow hot and cold in the same breath.

COMMISSION'S CONCEPT OF RELIGION

RELIGION, according to these ladies and gentlemen, consists of belief in certain fundamental principles and realities which are eternal and common to all religions. They say :

'The religion is defined by the Holy *Qur'ān* as belief in the unchanging laws of Nature and the basic principles of life that alter not. State and society while changing or feeling any urgent necessity for a change have to alter their superstructure without attempting to tamper with the eternally firm foundations, which according to the Holy *Qur'ān* are the basis of all religion. Islam desired humanity to hold firmly to certain fundamentals which, according to the symbolic language of the Holy *Qur'ān*, are indeliby inscribed on a Preserved Tablet called the Mother of the Book, or the Source Book of all life and existence. Nobody has the right or the power or the authority to change these foundations: they are *Muhkamat*. [*Then a* Hadīth *is quoted according to which those who unnecessarily pester the Prophet with questions are called* Azlamunnās. *After this the report says:*] This attitude of the Holy Prophet towards freedom of legislation in large undefined spheres is the basis of the accepted principle of Muslim jurisprudence that what is not definitely prohibited is permissible in the interest of public and private welfare, and is a charter for the freedom of legislation in matters wherein there nre no categorical injunctions.'[1]

This concept of religion appears *prima facie* to be very simple, innocent and harmless. But when one fathoms its real depths one finds that this concept is not the one propounded by the Qur'ān but the one that was expounded by the Bāṭinīyah who, by trying to make some unknown basic realities as the foundation of religion, expunged the entire *Sharī'ah* and thus tried to free individual and social life from all regulations and restrictions of the Qur'ān and the *Sunnah*. Following in the footsteps of the Bāṭinīyah, the members of the Commission have also claimed to preserve certain unknown 'eternal' and 'unchanging' principles

1. *The Report*, p. 1205.

in the 'Preserved Tablet' and purged religion from the entire remaining arena of life I wish they could enlighten us as to where, in which *Sūra*, the Qur'ān has enunciated this definition of religion. What are those 'unchanging' and 'basic principles of life' which constitute religion? Do these lofty principles have any existence in the external world or do they exist in the minds of the members of the Commission alone? I have thoroughly read the Report again and again but, I confess, I have failed to discover any eternal, unchanging principles in its contents. According to this Report, even the Qur'ān has changed according to the needs of the changing circumstances! That being so, where can we locate those eternal principles? If they exist only in the 'Preserved Tablet,' then we must know in what manner and through what process they are to influence and fashion the human life. What would be the agency for their revelation? For, we have in our midst nothing except the Qur'ān and the *Sunnah*. The honourable members of the Commission may have some access to the 'Preserved Tablet,' but surely the insignificant mortals like us have no access to that Sacred Tablet!

Perhaps these honourable members, by painting such a picture of religion, want to impress upon the minds of the common folk that religion is something very plain, simple and brief, while the benighted *Mulla* has made a phantom of it. Religion, they seem to contend, means belief in just a few simple, eternal and unchanging basic principles of life and that to formulate laws and regulations for the various spheres of human life we are given absolute freedom to use our own judgment; religion has no reason to poke its nose therein. The Holy Prophet vehemently disapproved of asking of questions after the basic realities had been enunciated. He has granted us complete authority to legislate in respect of all problems of our life and it is the accursed *Mulla* again, this vehcile of retrogression, who tries to drag religion on every turn and pass.[1]

1. This real aim of the Commission reflects in the entire Report. The defenders of the Report have also adopted the same attitude in a more outspoken manner, and have clearly exposed the real designs of the *psuedo*-reformers. A very leading supporter of the Report writes in a letter to *Dawn*, Karachi: 'Marriage is a matter of social discipline and

[*Contd. on next page.*]

A Muslim can never hold such a concept of religion, particularly of the religion of Islam. It can be entertained only by the *Bāṭinīyah* or the libertine who, in the name of religion, want to seek the gratification of their inordinate desires. Religion does not mean a mere belief in certain 'eternal principles'; it stands for an all-embracing way of life. It comprehends the entire compass of life and does not leave untouched any aspect of it whatsoever. Life has been endowed with intellect and thought; religion provides principles for their guidance. Life is meant *to live*; therefore religion envisages a comprehensive programme for the reform of all the fields of human action. Life, for its survival and growth and flowering, needs the institutions of family, society and polity; religion, therefore, determines all the four corners in these departments of social activity. And as life survives death, religion enunciates principles for salvation and success in the hereafter. Religion is a complete ideology of life, a perfect social order, and a comprehensive system of living which provides ample guidance for all the fields of existence. It sets proper limits to human behaviour in all the departments of activity. No doubt, within those limits, we are free to formulate laws and regulations; but this freedom is not unbridled and unlimited. We cannot break the limits set by the *Sharī'ah*. In matters about which no explicit injunction is given, we are directed to pursue a certain method known as *Ijtihād* which, in simple words, is an attempt to arrive at a decision in the light of explicit and implicit injunctions of Allah and His Apostle, their letter and spirit, their demands and requirements and the general scheme of life envisaged therein.

personal feelings and with the constant changes in civilisation and cultural outlook, it cannot but change in respect and significance. *To drag in the Holy Qur'ān at every step, with elaborately complex interpretations is but an ingenious design'* (*Dawn*, 29 August 1956). Another stalwart writes in a letter published in the 7 September 1956 issue of *Dawn*, Karachi: 'The Marriage Commission report is based upon human intelligence and human service. For that noble cause if one has even to import sound ideas from outside, one should not hesitate in doing so. It was the intelligence and conscience of man which assisted him in understanding religion first and accepting it. The same can guide us now and will continue to do so till mankind continues to live. *It is not true that we are Muslims first as stated by one of your correspondents.* On the other hand we are human beings first and then Muslims. To judge the report with a narrow mind will be disservice to the very cause of humanity, which the religion also stands for.' Now, this is the mind to which the Report has appealed.—*Editor.*

We shall discuss *Ijtihād* in greater detail in a subsequent section.

It is not possible here to give a detailed account of the scheme of life Islam envisages and the injunctions it has given for the various spheres of life. However, to substantiate our point, let us refer to the Islamic injunctions about marriage and family life insofar as this topic is of particular interest in the present context. It is these injunctions which determine the nature and significance of these institutions and provide limits which are inviolable.

According to Islam, the proper and legal relationship between man and woman is the one which occurs as a result of marriage properly constituted, conditioned by the injunctions about *Mehr* (dower) and *Iḥsān* (kindness and respect). Marriage to certain blood-relations is forbidden. Wife and husband both enjoy equal rights and shoulder equal responsibilities but, because of the peculiar position of each and for the consolidation of the institution of family, the husband has been made to hold charge thereof. He is responsible for the maintenance of the wife and he alone performs the establishment or the dissolution of marriage; but in case of any injustice the wife can seek separation directly or through court. This right of hers is called *Khula'* in the *Sharī'ah*. A man can marry up to four wives for some social, family, or personal reasons. These and similar injunctions have been given in the Holy Qur'ān and the Prophet of Islam (peace be upon him) has explained and exemplified them. It is these basic injunctions which constitute the structure of the Islamic system of family. I would like to ask the members of the Commission whether the eternal principles embodied in the Sacred Tablet (*Lauḥ Maḥfūz*) do or do not include these principles of family life.

The Commission are wrong when they say that the Holy Prophet (peace be upon him) disapproved of asking of questions in matters of religion. Not at all. On the contrary, he welcomed questions and encouraged those who asked him about different aspec s of Islam. Prophet Muḥammad (peace be upon him) answered thousands of questions and it is through his replies that innumerable points have been clarified and countless avenues of growth have been illuminated. Those who asked questions were the benefactors of mankind in general and of the *Ummah* in

particular.[1] If the Holy Prophet (peace be upon him) disapproved of any questions, they were irrelevant and unnecessary questions which sprang out of insincerity or petty quibblings. He disapproved of questions of the kind that were asked by the Bani Israel (the children of Israel), like the one referred to in the Qur'ān about the colour, size and age of the cow they were asked to sacrifice. The Prophet disapproved of only such questions and not all questions about religion. It would be absurd to generalise on the basis of such exceptions.

Thus we see that the concept of religion given by the Commission has no relevance to the concept given by the Qur'ān. It may be a reflection of their own imagination, but is decidedly not what Islam stands for. Islam is a complete code of life and one has to adopt it *in toto*. If anybody accepts some parts of it and rejects some other, he actually rejects Islam. Islam does not approve of partial and selective adherence; it demands total adoption and complete surrender.

COMMISSION'S CONCEPT OF THE QUR'AN

THE Commission, after giving a beautiful sermon on the eternal role of Islam and its unchanging principle proceed to declare:

'Islam is another name of the eternal principles of life whose validity is not touched by historical vicissitudes to which all nations are subject. It is not Islam but the temporal regulation of human relations that suffers a constant change. Even while the *Qur'ān* was being revealed, the alteration of circumstances was matched by alteration of some injunctions. History of early Islam is full of such instances. Who can say that human life has ceased to change and grow and has not made much of ancient law already obsolete that was once necessary for the direction

1. How could the Prophet disapprove of questions in matters of religion when the Qur'ān states *Ta'lim al-Kitāb Tabyin al-Āyāt* as important ingredients of the prophetic mission.

The Qur'ān says: 'Allah verily hath shown grace to the believers by sending unto them a messenger of their own who reciteth unto them the Scripture, causeth them to grow and get purified, and *teacheth them the Scripture and wisdom*' (iii. 164).

'With clear proofs and writings; and We have revealed unto thee the Remembrance (i e. the Qur'ān) that thou mayest *explain* to mankind that which hath been revealed for them' (xvi. 44).—*Editor.*

of human affairs.[1]

Thus the learned members of the Commission seem to impress that the Islamic principles are eternal and unchanging but that the regulations which Islam has given in regard to the various aspects of human life are to change with the passage of time. Institutions of family, society and state formed in the adolescence of human civilisation cannot hold good in this age of maturity. With the march of history, rules and regulations of social organisation must also change. A baby's frock is useless after infancy. When the nature of relationship between employer and employee, landlord and tenant, labour and capital have changed, the system of life which respected the former relationship must also change and yield place to the new. If a certain position was given to husband and wife in a certain stage of society or in a certain socio-economic order, then with the change of economic conditions, their positions should also change. If in the past the husband was the head of the family, now in the new order it is not essential that the old values should be adhered to. They can be changed and it is possible that in the new age the wife may head and hold charge of the family and necessary alterations be effected in family structure. Such changes, we are told, would not be tantamount to the change the 'eternal principles' of Islam. For 'even while the *Qur'ān* was being revealed, the alteration of circumstances was matched by alteration of some injunctions.' Then why not today? The injunctions and regulations which the Qur'ān has given for different temporal matters are mere 'temporal regulations'; verily, they are not the 'eternal principles' which are embodied in the Sacred Tablet, whose 'validity is not touched by the historical vicissitude.' This is what the learned authors of the Report have said. Shorn of the terminological trappings, what it amounts to is that the injunctions of the Qur'ān too are not eternal and unchangeable. When one reads the praises which the Commission have showered on the basic and 'eternal principles' of Islam, one falls a prey to the illusion that at least the Qur'ān is the embodiment of those eternal principles and its injunctions are for all times and climes. After reading the whole of the Report, it dawn upon the reader that the structure of our individual, family

1. *The Report*, p. 1231.

economic and political life is 'temporal' and 'temporary' and the regulations governing them are to change with the change of circumstances. What to say of the centuries that have passed, the regulations and injunctions had to be changed 'even while the *Qur'ān* was being revealed'! And if 'human life has not ceased to change,' and who can dare say so, then most of the laws and regulations given by the Qur'ān are 'already obsolete' and none can save them from becoming petrified and obsolete with the change of times.

Keeping these in view we fail to understand what those eternal principles are. Are all of them embodied in the Sacred Tablet alone or can some of them be found in the Qur'ān as well? If any portion of these 'eternal principles' is to be found in the Qur'ān we would humbly request the authors of the Report to kindly point them out, so that the Muslims may be able to heave a sigh of relief that at least some portion of the Qur'ān —howsoever small that portion may be—is eternal and is to remain safe from the encroachments of the 'reformers.' If they are kind enough to point that out, the *Ummah* would be extremely grateful to the members of the Commission—for in the light of the present declarations of the Commission, the entire Qur'ān lies helpless under the guillotine of change!—in so far as everything that is in it, be it about belief and faith, or prayer and *'ibādat* or individual and personal life, or social, economic and political order, is definitely related to human life and human relationships, and as such must be affected by the changing circumstances!

SUNNAH AND THE COMMISSION

ALTHOUGH the word *Sunnah* has been used again and again in the Report, in fact the position of *Sunnah* and *Ḥadīth* has not remained immune from the onslaughts of its author. And how could poor *Sunnah* remain immune when even the Qur'ān has not been spared in this mighty assault? If they have used the word *Sunnah* again and again, it is perhaps because the word has been used in our Constitution as well as in the Commission's terms of reference, and as such they had no option. They have, however, done their sacred duty by giving, in the end of the

Report, a very profound and well-meaning suggestion to the Government that if they want to bring about any change they must get prepared to take a very bold and revolutionary step. They say :

'In the words of Allama Iqbal, "the question which is likely to confront Muslim countries in the near future, is whether the law of Islam is capable of evolution—a question which will require great intellectual effort, and is sure to be answered in the affirmative; provided the world of Islam approaches it in the spirit of Omar—the first critical and independent mind in Islam who, at the last moments of the Prophet, had the moral courage to utter these remarkable words: "The Book of God is sufficient for us . . ." '[1]

I do not here propose to discuss these views as the views of the late 'Allama Iqbal—for he is no longer amongst us and it is not possible to know what he actually meant by these words which are open to different interpretations.[2] But the authors of the Report, by putting these words into a certain context of their own, have clearly shown that they want to say that if the task of reform and reconstruction is to be taken up, it cannot be performed within the restraints and limitations of the *Sunnah* and the *Ḥadīth* and a revolutionary step—the declaration that the Book of God is sufficient for us—is essentially called for.

We have already seen what views these upholders of *Ḥasbuna Kitābullāh* (the Book of God is sufficient for us) hold about the Book of God. Now in this passage they have manifested their approach towards *Sunnah* and *Ḥadīth*. After all what could be the reason for referring to Iqbal and Caliph 'Umar in so dramatic a way except to impress upon the minds of the untutored readers that if a poet and philosopher of the stature of Iqbal has said so then it must contain a large grain of truth and cannot be a sheer outburst of fancy. And when he will read that 'Umar Fārūq declared at the very last moments of the Prophet's life that Muslims

1. *The Report*, p. 1232.
2. The fact is that Iqbal never meant what these learned persons have tried to make out. They have given their own meaning to Iqbal's words. These words have been torn from their context and now a new construction has been put upon them. An idea of how they have exploited the name of Iqbal can be had by reading the Editor's article : 'Some Reflections on the Marriage Commission Report.' For Iqbal's views on *Sunnah* see Khurshid Ahmad, 'Iqbal's Concept of *Sharī'ah*,' *Iqbal Review*, Karachi, Vol. 1, No. 2 (July 1960), pp. 67-97

were not at all in need of the Prophet's guidance and that the Book of God is sufficient for us, then it would bewilder the cautious and the God-fearing and would confuse or even lead astray the unintelligent and the unreflective. They might begin to think that the *Sunnah* is not a basic source of Islam and that the *Mulla* has given it an unnecessary importance!

Now let us look into the contents of the assertion.

First of all let it be known to all that the event ('Umar's declaration at the last moments of the Prophet) which has been referred to here is itself disputed by the authorities. Shiblī, in his valuable research study, *al-Fārūq*, says that no such event ever happened. Other leading scholars and authorities have also taken the same stand, but it would suffice here to refer to Shiblī whose authority the authors of the Report also admit. They must know that the saying on the authority of which they call 'Umar the 'first critical and independent mind in Islam' is itself a disputed one and their own esteemed 'critic' and 'independent thinker' Shiblī denies its very occurrence.

Even supposing the report as correct and accepting that 'Umar did actually utter the words attributed to him, how would it be fair to give to his words those strange meanings which certain misguided sections have tried to impart to them? It should be the endeavour of every honest student of Islam to study those words in their pure and simple meaning and, instead of *reading his own ideas in those words*, accept those meanings which naturally flow from them. If anybody says, 'God is sufficient for us,' how does it follow from it that he does not believe in the necessity of the Book of God and the guidance of His Prophet? Similarly, if anyone says 'The book of God is sufficient for us,' how does it follow from it that he denies all other sources of Islam? On the contrary, the need and authority of the *Sunnah* is implied in the words *Ḥasbuna Kitābullāh*, for it is the Book of God which directs us to the *Sunnah* of the Prophet. The entire life of Caliph 'Umar bears testimony to the fact that he never discriminated between the Word of God and the *Sunnah* of the Prophet (peace be on him) and always invariably submitted to the Prophet's way. *Sunnah*, in fact, is but an explanation and exemplification of the Qur'ān. So, how can a wedge be driven between the two? By presenting

'Umar as the man whor evolted against *Sunnah* at the last moments of the Prophet, the members of the Commission are doing the greatest injustice to the man who loved the Prophet with all his heart and soul, followed his *Sunnah* throughout his life, eagerly searched for each and every word and deed of the Prophet and established the law of the Qur'ān and the *Sunnah* in his mighty and glorious reign. One who has even the slightest respect for 'Umar can never dare to pay him such a cruel and bitter tribute.

These learned dignitaries have contented themselves with calling 'Umar 'the first critical and independent mind in Islam,' but we are afraid that this title has been conferred upon him out of ignorance, because if they knew all the details about the life and thought of 'Umar Fārūq, they must have called him 'the first great conservative'! Is it not a fact that nearly all those things which they have called as repugnant to the 'liberal' spirit of Islam, or as *bid'at* (undesirable innovation), or which they have christened as the symptoms of decay and confusion, were fully upheld and advocated by that 'first critical and independent mind in Islam'? Nay, some of them were actually introduced and enforced by 'Umar. And, beyond doubt and without exception, all those things were practised throughout the world of Islam and, despite all power and authority and the alleged zeal for reform, 'Umar never even thought of curbing them. These learned reformers regard the practice of the pronouncing of *ṭalāq* three times at a single sitting as *bid'at* and have denounced such divorce. If this is a *bid'at*, let it be known that the founder of this *bid'at* was none but 'Umar. The Commission regard the marriage of those below eighteen and sixteen years of age as a crime. If this be a 'crime,' then verily this 'crime' was committed by 'Umar himself when he married Umm Kalthūm. Furthermore, the respected father of Umm Kalthūm, 'Alī, who is regarded as the greatest legist and jurist in the history of Islam, was also a party to this 'crime,' for the marriage was celebrated with his consent and permission. *Purdah* must also be a crime in the eyes of the honourable members of the Commission, and here too 'Umar stands guilty. It is related in the *Aḥādīth* that 'Umar, time and again, expressed the desire that the wives of the Prophet should observe *Purdah* and it was after his expression of this desire that

the Qur'ānic injunctions about *Purdah* were revealed. 'Umar also divorced his wives and from amongst those divorced wives was Muslamah. Now, nobody knows what the 'reason' was for that divorce. It is also true beyond doubt that polygamy did prevail in his reign and he sanctioned it. Now, if all these things are retrogressive, repugnant to the real 'liberal' spirit of Islam and a product of legalistic quibblings and *fiqhī* intolerance and short-sightedness and if, despite vast authority and power, 'Umar did not try to reform these during the course of his *Khilāfat* and instead sanctioned and encouraged them, how can he be called 'the first critical and independent mind in Islam'? Or, is he being called independent and critical only because of the alleged declaration that 'the Book of God is sufficient for us'? If the answer is in the affirmative, let it be known that, first of all, the words attributed to him are incorrect and unsupported by proper evidence and even if they are correct, they do not lend the least support to the meaning which these luminaries are trying to deduce. 'Umar was decidedly an independent critic, but he was neither such a 'great critic' as to criticise even the Holy Prophet of Islam, nor 'liberal' as to 'liberate' himself from the *Sunnah* of the Prophet (peace be upon him) immediately after his demise. Such views are mere fanciful outbursts of the *psuedo*-reformers and have no roots in truth and reality.

ISLAMIC LAW—AS THE COMMISSION VIEW IT

THE Commission's views on Islamic law are as follows:

'Life is a creative and adaptive process and it requires more of vision and less of inflexible rules. The original simple and liberal spirit of Islam must be revived and for guidance we have to go back to the beginning of Islam when it was yet free from accretions. Later multiplications of laws and codes *may be studied as facts of historical importance, but can never be identified with the totality of Islam.*"[1]

This quotation clearly shows that in the eyes of the members of the Commission *Fiqh* occupies no religious and legal importance. At best it presents certain aspects of our history, has an historical importance, and no more. As by studying *Ṭabarī*, *Kāmil*

1. *The Report*, p. 1231 (*emphasis* ours).

of Ibn Athīr and *Tārīkh al-Khulafā* one can know the history of a certain period, similarly by studying *Mabsūṭ*, *Mudawwana* and *Kitāb al-Umm*, one can learn the legal trends of a certain age. These source-books of *Fiqh* occupy no place of greater importance.

At another place[1] the Commission have tried to differentiate between *Fiqh* and *Sharī'ah*. They say that they do not propose any changes in the *Sharī'ah*, they merely want to change the *Fiqh*. And as the *Fiqh* is based upon experiences, it cannot remain a preserved field for the *'Ulama*. Everybody has a right to express his opinion about its problems.

Nobody can say that both *Sharī'ah* and *Fiqh* are one and the same and that there is no difference between them. But the fundamental questions are: What is the real nature of that difference? Are the changes and 'modifications' they are suggesting merely changes in the *Fiqh*, or is the *Sharī'ah* itself the object of their encroachments?

The nature of the difference between *Sharī'ah* and *Fiqh* is not that *Sharī'ah* cannot be changed while *Fiqh*, being based on experience, has just an historical importance and can be changed as one pleases. Such a view can stem from sheer ignorance alone. The difference between the two is that the *Sharī'ah* (Qur'ān and *Sunnah*) is the SOURCE, while *Fiqh* is the DERIVED LAW. Their mutual relationship is that which exists between the original and the derivative. As long as the derivation is correct, the derivative is a part and parcel of the *Sharī'ah* and cannot be separated from it; but, if any portion of the derivative is proved to be a faulty derivation, then that part of it will be outside the pale of *Sharī'ah*.

Now, it automatically follows that every Tom, Dick or Harry cannot judge whether the derivation is correct or not. The task can be performed only by those who have a mastery over both the *Sharī'ah* and the *Fiqh*, notwithstanding whether they come from the category of *'Ulama* or the non-*'Ulamā*. Experience is relevant to *Fiqh*, no doubt, but it is wrong to say that *Fiqh* is based primarily and essentially on experience alone. The real contribution of experience was that it induced and spurred the legists to find out from the general and other injunctions of the Qur'ān and the *Sunnah* answers

1. *The Report*, p. 1205.

to those problems which were not explicitly stated in the *Sharī'ah*. It is totally incorrect to say that *Fiqh* is a product of experience alone. Although, in its codification, the needs of practical life were fully taken account of in the same way as the architect will take note of climate, atmosphere and other factors while constructing a mosque, yet these factors can never change or influence the fundamental nature of the mosque; its very direction towards *Qibla* cannot be altered because of atmospheric pressures!

Thus it follows that the real importance of *Fiqh* is religious. But along with that it has an historical importance as well. A study of the historical evolution of Islamic law reveals to us all those factors and stimuli which induced Muslim scholars to ponder over the *Sharī'ah* and evolve befitting solutions to new problems. This, however, is something quite different from what the members of the Commission have said. In their view, *Fiqh* has only an historical importance. There is hardly any difference between the position of Ibn 'Asākir's *Tārīkh al-Baghdād* and Sarrakhshi's *Mabsūṭ*. A book of history cannot be a deciding authority (*ḥujjat*) in the complex problems of our life; but a book of *Fiqh* is a *ḥujjat* for a man who deems that to be correct. For the unlettered common folk reliance on *Fiqh* is the only way to remain fully attached to their religion and to live according to the dictates of their faith. If everybody tries to forge a new *Fiqh* in the light of the experiences of his own age, then heaven alone knows in what abysmal pit he would fall. The 'experiences' and 'practices' of our times are that there is no harm in the free-mingling of both the sexes and that free-mingling is essential for progress; that adultery, if committed with mutual consent, is an innocent play; that drinking, gambling, interest, etc., are indispensable accessories of life and, if any one of these is discarded, the society will be put in the inverse gear. Now, who knows where these 'experiences' will lead the common man to and what his fate would be here and in the hereafter?

Somebody may object that the things referred to above have been decided by the *Sharī'ah* and they cannot be changed. I wish it had been so. I wish they had clearly stated that so and so is *Sharī'ah*. But no, the members of the Commission have remained vague and elusive, and looking to the views they have expressed about the Qur'ān, *Sunnah*, religion and *Fiqh*, one is painfully driven to the conclusion that in their eyes nothing but their own wishes and fancies constitute the *Sharī'ah*!

4. IJTIHAD: ITS NEW PRINCIPLES

The Commission, after emphasising the compelling need of *Ijtihād*, have offered a new definition and propounded some new principles of *Ijtihād*. Perhaps the exposition of this new *Fiqh* was essential, because without it the Commission could not justify the radical steps they have proposed in the Report. The task which the members of the Commission have arrogated to themselves could not be performed by resort to the established principles of *Fiqh*—they would rather be the greatest impediment in their mission of 'reform' and revision of Islam. Before taking up a discussion of the recommendations of the Commission, therefore, I would try to x-ray these new principles.

As far as the Commission's discourse on the need of *Ijtihād* is concerned, I have nothing to say. I myself believe in the need of *Ijtihād*. What has grieved me in this respect is not the view of the Commission, but their failure to support their contention with weighty arguments and thoughtful reasoning. They regard themselves as great creative minds, which their arguments belie. They have referred to one verse of the Qur'ān and three *Aḥādīth*; but the verse is irrelevant and two of the three *Aḥādīth* are *ḍa'īef*. This is the great knowledge they have paraded! Perhaps the only source of their knowledge of the subject is the Urdu translation of Ṣubḥī Maḥmaṣṣanī's book, *Falsafah al-Tashrī' fī al-Islām*. The fact is that there are countless arguments for the views expressed above and there is no dearth of Qur'ānic injunctions and sayings of the Holy Prophet (peace be upon him) in support of this stand. I need not go into the details of this discussion here, as, for reasons of my own, I believe in the need of *Ijtihād*. I hold that the need has remained alive and pressing in all times and climes and will remain so as long as human civilisation exists. But I strongly differ from the Commission in regard to their definition of *Ijtihād* and in regard to their enunciation of the new principles of *Fiqh*, and I shall discuss them in the following pages.

IJTIHAD: DEFINITION AND ITS CONDITIONS

THIS is how the Commission, basing their views on Iqbal, define *Ijtihād*:

'"The word (*Ijtihād*) literally means to exert. In the terminology of Islamic law it means to exert with a view to form an independent judgment on a legal question . . . ."'[1]

In the opinion of the learned authors of the Report no specific qualifications are essential for the person who is to exercise *Ijtihād*. Neither any specialised knowledge of religion nor a command over Arabic, the language of the original sources of Islam, they think, is essential for that task. Instead, any person with some sort of knowledge whatsoever is entitled to this function for, they say, there is no priesthood in Islam and it has not distinguished 'priests' from the people and has not given them any extraordinary powers and privileges. They say:

'Hazrat Umar saw that even a common woman sometimes gave a better judgment than he himself, if she speaks from knowledge she is exercising a right granted to her by Islam.'[2]

The Commission hold the view that *Ijtihād* can be exercised even against the consensus of opinion and the unanimous *Ijtihād* of the earlier juris-consults. Rather they have actually exercised such *Ijtihād* and have disregarded the unanimous verdicts of all the earlier jurists. Their argument is that (*a*) none of the earlier *Mujtahids* was infallible, and that (*b*) as in the realm of science the consensus of opinion of all the scientists of one period is no proof of the validity of a proposition, so in the history of law the agreement of all the *Mujtahids* is no guarantee of its eternal correctness. They say:

'. . . in some cases the Commission has preferred the injunctions of the *Qur'ān* and Sunnah to the interpretation of the later jurists whatever be the degree of their agreement or disagreement because none of them professed to be infallible. As in science, so in the history of law, sometimes even the unanimous opinion of the savants of a particular epoch is no guarantee of its truth or validity.'[3]

Now I shall discuss these views of the Commission and for

1. *The Report*, p. 1199.
2. Ibid., p. 1201.
3. Ibid., p. 1232.

the sake of brevity shall confine myself only to the points referred to above even though the Commission have unfolded much profuse material for discussion and criticism.

If *Ijtihād*, in the terminology of Islamic law, means forming of 'an independent judgment on a legal question,' then what difference is there between *Ijtihād* and legal judgments and opinions of modern legislators? Would it not mean that the Muslims have simply christened independent legislation as *Ijtihād* and there is no material difference between the two? In point of substance, when the U.S. Congress forms an 'independent judgment on a legal question,' it exercises *Ijtihād*. And when the British or the Bharati Parliament forms any legal opinion, it also resorts to *Ijtihād*. And all these formulations of legal opinion are to be regarded by Islam as *Ijtihād*!—for aren't they 'independent judgments on legal questions'? Had the learned members of the Commission said that these were their views on *Ijtihād*, we would have let them go unchallenged. But when they claim that this is the meaning of *Ijtihād* 'in the terminology of Islamic law,' then it automatically means that this view is derived from the Qur'ān and the *Sunnah* or is being said on the authority of Muslim legists and juris-consults. *Ijtihād* is a legal term and only that meaning of it will be taken as authentic which emanates from authorities on Islamic law. No other definition, from howsoever respectable quarters, can be regarded as correct and authentic. It is the prerogative of the scholars of Islamic law to define the legal terms of Islam and if anybody differs from their definition, he must criticise their standpoint with reason and argument, expose their fallacies, and propound his own definition in the light of the Qur'ān and the *Sunnah*. But nobody has the right to impose his own meaning upon the term and then declare that this is what it means in the legal terminology of Islam. Having consulted the works of authoritative Muslim legists and juris-consults of all epochs, I make bold to say that none of them subscribes to that meaning of *Ijtihād* which the Commission have imparted to it. It is not possible to give here all the necessary references, but I would like to quote a few top authorities on Islamic law to substantiate my contention.

'Allāma 'Amādī, in his renowned work *al-Aḥkām fī Uṣūlil-*

Aḥkām, after giving the literal meaning of the term, enunciates its legal and technical meaning. He says:

'In the terminology of Islamic jurisprudence (*uṣūl*) *Ijtihād* means that sustained and maximum effort which is undergone to discover and ascertain in regard to any legal proposition whether or not it is in accordance with the *Sharī'ah*.'[1]

The well-known authority Imam Shātibī defines *Ijtihād* in his *al-Muwafiqāt* as follows:

'*Ijtihād* means one's exerting oneself to the utmost to discover and ascertain the dictates of the *Sharī'ah* and to apply them to the actual conditions of life.'[2]

Ṣubḥī Mahmassānī's book *Falsafah al-Tashrī' fī al-Islām* is perhaps the most authentic source of Islamic law in the eyes of the members of the Commission. A perusal of the definition which he has given will also prove instructive. He writes:

'Literally, *Ijtihād* means "exerting to the utmost," but in the terminology of law it means that effort which is made to arrive at the knowledge of commands from the sources of *Sharī'ah*, i.e. the endeavour to deduce commands from those mainsprings of Islam which we have earlier discussed.'[3]

Now, it can be easily seen what the real meaning of *Ijtihād* is and what these people are trying to make it. There is all the difference in the world between deducing commands from the main sources of Islam and formulating independent judgment on any legal question.[4] But the members of the Commission have ignored it altogether. They have tried to give a distorted, incorrect and misleading meaning to a legal term. And perhaps

1. A'mādī, *al-Aḥkām fi Uṣūlil-Aḥkām*, Vol. IV, p 218.
2. Shātibī, *al-Muwafiqāt*, Vol. IV, p. 89
3. Ṣubhī Maḥmaṣṣānī, *Falsafa al-Tashrī' fi al-Islām* (Urdu translation), Majlis-i-Taraqqī-i-Adab, Lahore, p. 153.
4. It would be instructive here to point out that even the western orientalists have not been bold enough to twist the meanings of *Ijtihād* in the way the honourable members of the Commission have done. Here we refer to two leading authorities to show that the westerners have also relied on those meanings of this term which have been given by the authorities of Islamic law.

The Encyclopaedia of Islam, on the authority of the *Dictionary of Technical Terms*, writes: '*Ijtihād* means the exerting of oneself to the utmost degree to attain an object and is used technically for so exerting oneself to form an opinion (*ẓann*) in a case (*qaḍiya*) or as to a rule (*ḥukm*) of law. This is done by applying analogy (*Qiyās*) to the Qur'ān and Sunnah.'—Macdonald, in *Shorter Encyclopaedia of Islam*, p. 128.

Similarly, Hughes' *Dictionary of Islam* defines *Ijtihād* as: 'The logical deduction on a legal or theological question by a Mujtahid or learned and enlightened doctor' (London, 1953, p. 197).—*Editor*.

the Commission could not help it for, without such a concept of *Ijtihād*, they could not make the recommendations they have made: recommendations which are as independent of Islam as are the independent judgments of the parliaments of U.K., U.S.A. and Bharat!

The Commission have referred to a saying of Imam Mālik 'I am a human being; sometimes I am right and at other times I am wrong; test my judgments on the Book of Allah or *Sunnah*, and if they are not in conformity with them throw them away.' Similarly, they have quoted Imam Aḥmad bin Ḥanbal as saying: 'Do not follow me or Mālik or al-Shāfi'ī or Thaurī, but exercise your own judgment to draw conclusions from the sources from which they drew them.' These quotations have been referred to by the Commission to prove that the early juris-consults were not innocent. These sayings beyond doubt prove this point, but do they also not prove that *Ijtihād* is the name of that effort which is exerted to deduce rules from the sources of *Sharī'ah* and that it does not mean the formulation of any independent judgment. Had it not been so, why should Imam Mālik have suggested to test his own *Ijtihād* on the touch-stone of the Qur'ān and *Sunnah*, and why should have Imam Ḥanbal asked to refer to the fundamental sources of Islam? Thus we find that the Commission's concept of *Ijtihād* is incorrect and untenable.

Now, let us look to another aspect of the problem. The members of the Commission do not think that any qualifications are essential for a *Mujtahid*. To bring up the alleged spirit of democracy, they think that everybody can and should exercise *Ijtihād*. In support of this, they refer to the well-known incident of a woman who once corrected 'Umar during his *Khuṭba*. And if, after all, they admit the need of any knowledge in this respect, that is the knowledge which they themselves think to possess and not the knowledge of the Qur'ān and the *Sunnah* and the Arabic language. To support this view they have forged two arguments. First, they hold that as there is no priesthood in Islam therefore *'Ulama* and non-*'Ulama* stand on an absolutely equal footing. Secondly, they have very adroitly tried to give a wrong impression to the reader by translating *'Ālim* and *'Ulama* as 'Muslim scholar' or 'people with knowledge.' By this device they have

tried to impress upon the common folk that even the *Ḥadīth* entrusts this task to all the educated people and not exclusively to those who are well versed in the Qur'ān and the *Sunnah*!

If this definition of *Ijtihād* is correct, then there remains no doubt that no deep and specialised knowledge is essential for exercising *Ijtihād*; anybody can do the job. But if *Ijtihād* is what we have defined above, then it is a very delicate task and a *Mujtahid* must have very deep insight into the Islamic ideology. He must be well versed in the original sources of Islamic law and must have mastery over the language of these original works He should also have a strong and trustworthy moral character so that people could rely upon him in matters of religion. In the Qur'ān and *Ḥadīth* the word *'Ālim* has been used for persons who are endowed with these attributes and qualifications. It is an attributive title and not a family or class name. Unfortunately, in the present age this word has been associated even with some of those who do not deserve it. But despite this misapplication it retains its real meaning and status. Knowledge, learning and character are not things that can remain hidden and concealed. The grain can be distinguished from the chaff.

Surely enough the *'Ulama* are not a hereditary group. Any person who attains the required knowledge and develops the moral character can become an *'Ālim*. Those who try to foment hatred and prejudice against the *'Ulama* by dubbing them as a priestly class (which in fact they are not) expose their own narrow-mindedness, fanaticism and intolerance. And if I may be excused I would say that it even betrays an inferiority complex. A place and position which can be attained by effort and struggle, by the attainment of certain attributes and qualifications, can be obtained by anyone who labours and fulfils the requisites. Nobody can stop one from attaining this position. But the unfortunate situation with which we are faced is that a certain group of people know nothing about the *Sharī'ah* and are not even prepared to acquire knowledge, but all the same they are adamant to exercise *Ijtihād*, because Islam is not the prerogative of any group! If this logic can be accepted, it would mean that it is not essential that only experts of law should preside over the courts of justice and that points of law can be decided by every

Tom, Dick or Harry, and it is everybody's right to claim this position and make others accept his opinion on legal issues. Also that imparting of medical treatment is not the prerogative of the doctors and physicians and everybody should have the freedom to play with the lives of others in the way he likes; and that the construction of canals and bridges is not the prerogative of the engineers and anyone who may not even know the A.B.C. of engineering is entitled to guide the construction of canals and bridges. If this is democracy, then woe betide that, and in Islam there is no place for such a perversion of democracy.

If a certain task calls for a certain technical knowledge and training, it can be performed only by those who fulfil the requisite conditions. If knowledge of Islam, insight into the ends and the tenets of this ideology are essential for exercising *Ijtihād*, how can a person who is not even aware of the rudiments of the *Sharī'ah* arrogate to himself the position of a *Mujtahid*. Decidedly there is no priesthood in Islam, but Islam is the religion of God; it is not a mere plaything.

The instance quoted by the Commission is simply irrelevant. If an ordinary woman objected to an *Ijtihād* of Caliph 'Umar, it was not because there is no difference between the learned and the ignorant or because it was the democratic right of everybody to exercise *Ijtihād*, but because the opinion which 'Umar had expressed about keeping the *mehr* low was regarded by the pious lady as a contravention of the clear meaning of the Qur'ānic word *qantār*. She expressed her opinion on the authority of the Qur'ān and 'Umar accepted it because it was based on the Qur'ān. Surely in Islam everybody has the right to present his opinion and views on the basis of the Qur'ān and the *Sunnah* as that venerable lady did, and to get them accepted by the people. What is needed is knowledge and insight into the Qur'ān and the *Sunnah*. It is not essential to hold a degree from a particular institution or to belong to a particular group, but the person expressing the opinion must express it on the basis of proper arguments and sound knowledge—at least as much knowledge of Islam as the pious lady had. Now, anybody who cares to compare the *Ijtihād* of these members of the Commission with that of the lady referred to above can easily discover the difference between

the two.

Although the aforementioned definition of *Ijtihād* and the foregoing discussion are sufficient to show what qualifications are essential for a *Mujtahid*, I propose for the guidance and assistance of the general reader to further refer to the views of some leading authorities of Islamic jurisprudence on this question.

'Allāma 'Amādī deems the following two conditions as essential.

'First of all he must have staunch belief in the existence, the attributes and the prefection of God Almighty and in the Holy Prophet and the *Sharī'ah* he has brought.

'Secondly, he should have full command over the sources and laws and commandments of the *Sharī'ah*. He must know how the *Sharī'ah* affirms the rules, how it sets the arguments, what the different kinds of law are, difference between its various categories, in case of difference how the preferences are set, how the rules are inferred from the general principles and, moreover, he must also be capable of writing and explaining the commands of the *Sharī'ah* and to face the objections that may be raised against them.

'He should further be aware of the principles of *Ḥadīth*-criticism, the *Nāsikh wa Mansūkh* and the historical context of the Divine revelations and should be a scholar of the Arabic language and grammar.'[1]

Imam Shātibī writes in this respect:

'He who possesses the following attributes and qualifications is qualified to exercise *Ijtihād*:

'(*a*) He must have full undertanding of the (scheme and the) aims and objects of the *Sharī'ah* and should be imbued with its spirit and ideals.

'(*b*) He should be capable of deducing rules, in the light of this understanding of Islam, *from the original sources of the* Sharī'ah. *And in this he should have full mastery.*'[2]

Even the Commission's most favourite author, Ṣubḥī Maḥmaṣṣānī, writes:

'Everybody is not permitted to exercise *Ijtihād* nor is it proper for everyone to do so. It requires certain capacity and quality to enable a *Mujtahid* to become capable of formulating arguments and making deductions. Therefore it is essential that he must be a sane person of mature thought and high intellectual

1. 'Amādī, op. cit., Vol. IV, p. 219.
2. Shātibī, op. cit., Vol. IV, p. 106.

faculties. He should be a virtuous man of strong character and good morals. Then he should be a real scholar of the original sources of the *Sharī'ah*, i.e. he should know the ways and methods of theological reasoning and of discovering rules from the Islamic injunctions, and should have masterly knowledge of the Arabic language, *Tafsīr, Asbāb-e-nuzūl, Aḥwal wa ruwāt, Jirah wa ta'dīl* and *Nāsikh wa mansūkh.*'[1]

Can it be said that the members of the Commission possess these qualifications and come in any way up to this standard?

Let us now briefly discuss the other question whether *Ijtihād* can be exercised against the unanimous opinion of the great legists of the past.

There are two aspects of the question: theoretical and factual. As far as the theoretical aspect is concerned, I admit that there is nothing objectionable in the plea that such *Ijtihād* can be exercised. The early savants were not infallible and, therefore, rationally speaking, even an agreed and unanimous opinion of theirs need not be absolutely and always free from all shades of error. But it is not essential that what is theoretically possible must also be an actual fact. For instance, Iqbal was the greatest poet of our time, but is it impossible, rationally speaking, for one to be even a greater poet than Iqbal? But if on this premise, Mian Abdur Rashid or Khalifa Abdul Hakim or any of the Begums claims to be a greater poet than Iqbal, would it be acceptable to anybody? None of them have to their credit any literary or political work worth the name to qualify them to talk on these matters, to say the least of their being regarded as greater poets than the great literary personalities of our history. Now, can the people give even the slightest weight to the *fatwa* of Khalifa Abdul Hakim, Mian Abdur Rashid, Begum Shahnawaz and Begum Shamsunnahar on an issue on which legists and savants of the status of Imam Abū Ḥanīfa, Imam Mālik, Imam Shāfi'ī and Imam Aḥmad bin Ḥanbal are fully agreed? How can a cautious and conscientious Muslim set aside the unanimous verdicts of the savants of law and agree to adopt the *Ijtihād* of persons whose standard of knowledge and learning is what we all know.

Let it also be known to all that the veneration and attachment

1. Maḥmaṣṣānī, op. cit., p. 155.

which the Muslims have for the great savants of law is not something accidental, nor is it a product of sheer conservatism and *taqlīd*. Not the least. Conservatism and *taqlīd* may influence some people or groups but they can never blind the entire community. And, if for argument's sake, they have blinded the entire community and darkened the entire horizon I would make bold to say that this 'darkness' cannot be dissipated by the 'light' the Commission have enkindled. If these gentlemen and ladies regard it a state of stagnation, then they must know that even men of the stature of Imam Ibn Taimīyya and Shah Walī-ullah could not break the crust of it. In the circumstances where do Mian Abdur Rashid and Khalifa Abdul Hakim stand in this field? The fact is that the authority of the great savants of law was established by virtue of their knowledge and learning, insight and vision, *taqwa* and character, and their struggle, sacrifice and suffering for the cause of Islam. Their lives and works have convinced the *Ummah* that they took all pains to discover the real meaning of the *Sharī'ah* and left no stone unturned and that they can be relied upon with full faith and confidence. As against these venerable savants, how can the people repose their trust in the neo-Mu'tazilites whose lives have been spent in belittling Islam and in playing with the *Sharī'ah*?

The Commission have propounded yet another strange theory. They argue that as in the field of scientific knowledge even the unanimous opinion of all the scientists of an epoch is not a guarantee of its truth and veracity, so in *Fiqh* and religion such consensus is no proof of its truth. This is a strange argument because, first of all, science and religion are not analogous, and to apply the methods of one to the other is the fallacy of false analogy. Science is based on hypothesis and experimentation, while religion is based on revelation. In science there is every possibility that what you now regard as constant may to-morrow turn out to be changeable or what you deem as inviolable may be found out to be violable. But this cannot happen in religion. The Divine Revelation is totally immune from such errors, for it is nothing but unquestionable truth. If any error of the type is at all possible in the case of religion, it can be only the application of Divine Guidance to the problems of the day. And

here again there are different categories of this application and the *Ummah* has relied on their authority in accordance with their authenticity. For instance, there is the consensus of opinion of the *Khulafā i-Rāshidīn*. This is an inviolable authority and a source of law in itself. Then there is the consensus of opinion of the four Imams. Although not a consensus of the first order, this is a reliable source, because the *Ummah* has full faith in the great Imams in view of their knowledge and learning, their insight into Islam, their mastery over the Qur'ān and the *Sunnah*, and the purity of their life and character. Thus their consensus cannot be brushed aside by a mere new opinion. It is therefore that the legists of subsequent ages have not disregarded the unanimous verdict of the four Imams. Infallible they definitely were not, but this does not mean that their consensus should not be used as an argument or authority.

I wonder how a jurist of the calibre of Mian Abdul Rashid has failed to notice the mighty difference that ranges between science and law. In science there is no permanent place for precedents, but in law—and particularly in the legal system in which Mian Sahib has been educated—the entire super-structure has been raised on the pedestal of precedents.[1] Purge it of the precedents, or rob them of their authority, and the Anglo-Saxon law would be reduced to nothingness. Can Mian Abdur Rashid say

1. It is not possible to embark upon a detailed discussion of this point in a brief footnote. But even in secular law the difference between the method and task of science and that of law is not lost sight of. Science and law stand apart and the judge cannot adopt the method of the scientist. Let us quote a leading authority on law, Professor G.W. Paton, to throw some light on the problem. While discussing the differences between the two, he writes:

'The scientist is seeking to "describe what is," and objective tests may be used to discover the accuracy of the description. But the judge must "prescribe what ought to be," and once we introduce the element of value there may be legitimate difference of opinion which cannot be decided by objective experimentation . . . . In one sense courts are trying to evolve a reasonable hypothesis just as does the scientist, "but the nature of activity of each is fundamentally different."

'Moreover, a scientist is free to modify any theories which he finds inaccurate—his loyalty is to scientific truth and not to tradition. He is not bound to worship the golden idols of the past if they have feet of clay, but while a judge may not revere *he is bound to follow such precedents as are binding upon him* (see Leon v. Casey, 48 T.L.R. at 455). The common law doctrine of binding precedent has prevented final courts from engaging in tentative experiments.' *A Text-Book of Jurisprudence*, Oxford, 2nd Edition, 1951, p 153.—*Editor*

that in the higher courts of Britain precedents occupy the same place and authority which he wants to assign to the precedents of the Islamic law?

The Commission, while commenting on the causes of stagnation, have opined that at the fall of the 'Abbasids the libraries were burnt and plundered, the lamps of learning were put off and the ambition of independent thinking and *Ijtihād* thus came to be cooled down. Everything was regimented and at that stage the Muslims, in order to protect the law from the encroachments of second-rate innovators, closed the door of *Ijtihād* and sought safety in the *taqlīd* of earlier legists. This was done to arrest the disintegration of the Muslims.

Although I for one am not in agreement with this historical analysis, yet if the members of the Commission deem it correct and give so much weight to this argument, then I would like to ask what glorious revolution has occurred in the nineteenth and twentieth centuries that they have become impatient to gate-crash the doors of *Ijtihād*. I think that the catastrophe which befell Muslims after the downfall of the Mughals in India was far greater than the catastrophe that overtook them at the fall of the 'Abbasids. The Tartars, beyond doubt, destroyed most of the schools, academies and libraries of the Muslim world, but they did not influence the mind and thought of the Muslims to the degree they have been influenced by the Britishers. The Britishers did not set fire to our libraries, but they so poisoned our minds and blurred our thinking that we began to regard those huge libraries as packs of waste! They did not raze to the ground our schools and academies but they so changed the system of education that we began to regard it an insult to look towards our religious academies. They did not rob us of our freedom of thought and action, but so perverted our values that we became westo-maniacs and began to look upon western standards and values as unquestionable standards of truth and veracity. This is the situation which has been created because of the collapse of the Muslim society under the impact of the imperialist scourge of Europe. I, therefore, ask: Is it not more expedient, in the context of these conditions, to protect the Muslims from the innovators—not even second-rate but third-rate innovators—and save society from further disintegration?

I may once again emphasise that I am a staunch believer in the necessity of *Ijtihād* and feel its need even more deeply than has been expressed by the Commission, but after all there are certain essential conditions for *Ijtihād* and no *pseudo*-claimant to *Ijtihād* can be hailed as a *Mujtahid*.

NEW PRINCIPLES OF IJTIHAD

After giving their new concept of *Ijtihād*, the Commission have also propounded some new principles of *Ijtihād* and I deem it proper to cast a critical glance over these novel principles before proceeding further.

First principle: state and social justice

The Commission have enunciated the principle that 'government is the custodian of social justice' and as such it should act likewise. If this principle had been propounded in any text-book of political science or in the directive principles of any constitution, there would have been no cause to object to it. But the Commission have suggested it as a directive principle for Islamic legislation. The Commission suggest that in legislating on social problems—which the Government is bound to do in the light of the *Sharī'ah*—it should be free from all limits and restrictions. And in the pursuance of this line of thinking, they have asked the Government to give legislative effect to the recommendations they have made.

Nobody can deny that government is the custodian of social justice and our Government too is such a custodian. But it does not mean that under the facade of this principle the Government can pursue a policy to the utter disregard of religion and the fundamental law of the state. In our Constitution it has been clearly stated that:

'Wherein the principles of democracy, freedom, equality, tolerance and social justice *as enunciated by Islam should be fully observed*?[1]

It has also been said therein that 'No law shall be enacted which is repugnant to the injunctions of Islam as laid down in the Holy Qur'ān and the *Sunnah*.'

1. Preamble to the Constitution.

Moreover, the Constitution places another restriction on the Government by explicitly providing that, as far as the personal law of any sect is concerned, the Government will not interfere with it. The duty of an Islamic state is to establish the law of God and not to obstruct or pervert or twist it. Nor can it innovate and evolve a new religion. This is what Caliph Abū Bakr declared in his first address: 'I shall enforce the *Sharī'ah* of Allah and I am not an innovator or a purveyor of things new.'

Now, one fails to understand for whose benefit the Commission have evolved this new principle of legislation. As far as the Government of Pakistan is concerned, she is bound by the Constitution to respect certain limits which she cannot transgress. She cannot violate these limits and restrictions. The golden suggestion dished out by the Commission is, therefore, useless for the Government and will remain useless unless she chooses to become a despotic and totalitarian government disregarding all legal and social limits. And this is not peculiar to our Government. No other government of the world can make indiscriminate legislation in the name of social justice. No one can dare do so. The only instance that one comes across is that of Soviet Russia where, in the name of social welfare, the entire social system has been radically changed by the force of a series of Acts (of 1918 and 1927). Guardianship of children was taken over by the state and all those marriages which were sanctioned by religion were annulled. The institution of family was dubbed as the last resort of capitalism and legitimate and illegitimate children were given equal status. And the only plea for this policy was 'social justice.' But the results of this radical policy were so devastating that even the very authors of this policy cried in bewilderment and had to reverse it. Do the Commission want to point out to our Government this very road of radicalism and anti-constitutionalism which is bound to end in utter devastation?

Second principle: New age, new laws

The Commission's second principle of *Ijtihād* is that 'distinction should be made between the injunctions on the basis of their universality or applicability to a particular structure of society in a particular epoch and in a particular region.'[1]

1. *The Report*, p. 1204.

What does this golden principle mean? It means that all the injunctions of Islam are neither universal nor true and applicable for every age and region. Some of its injunctions were merely for the Arabs and it would be futile to apply them to the entire human race; some were meant for a particular structure of society and have no relevance for other societies, and some were true for a particular epoch and became obsolete for subsequent ages. This being so, it is contended, it would be sheer ignorance and conservatism to regard the injunctions of Islam as universal and true for all epochs and regions.

One would like to ast: On what authority has this golden principle been propounded? Not on the authority of the Qur'ān and the *Sunnah* or of reason and logic, but on the authority of the great legist of all ages Alfred Tennyson[1] who says: 'The old order changeth yielding place to new and God fulfils himself in many ways lest one good custom should corrupt the world.' It is really amazing and unfortunate that those who are not prepared to concede even to the authority of God and His Apostle so easily succumb to the poetic fancy of an English romanticist!

I would like to ask these honourable members that if the injunctions of Allah and His Prophet are not true and applicable for every region, epoch and society, how can the poetic outburst of Tennyson be true and authoritative for every age, culture and country? On what grounds can this 'injunction' be regarded as universal and eternal, and how on the authority of this romanticist can any sensible person brush aside the revealed religion of God?

Secondly, what Tennyson says is that all that is old, however good, sacred and respectable that may be, is an unmixed evil and an undiluted curse, while all that is new and modern, however menacing it may be, is in fact a great blessing—nay, is the very embodiment of God's will. Thus if we do not adopt the new, it would mean that we are revolting against the will of God, against the way which God has chosen and willed for us. Shorn of the literary camouflage, it would mean that Islam might have been the embodiment of God's will in the period it emerged and

1. Alfred Baron Tennyson (1809-1892) was an English romanticist poet of the Victorian era.—*Editor.*

prevailed, but in the present age the manifestation of God's will is but the modern western civilisation for 'God fulfils himself in many ways lest one good custom should corrupt the world.' Thus God's will in the modern era has manifested itself in this modern form and if an attempt is made to establish Islam as against this modern way, it would 'corrupt the world.' This is the logical outcome of Tennyson's views and we wonder how the Commission can avoid it.

Thirdly, if the Commission really believe in what Tennyson has said, then they must know that his suggestion is that all that is old is to be discarded. In his view there is no place for the adoption of certain things from the old and the rejection of certain others. He believes in outright rejection of the past and the members of the Commission cannot derive support even from Tennyson for their new-fangled principle.

This, however, is not the only aspect of the question. Let us see what dangerous practical potentialities this approach of the Commission bears.

The Commission propose to differentiate between the universal and the non-universal injunctions of Islam, to adopt the universal ones and to drop the rest. If for argument's sake we accept the plea, then the question arises: Who will perform this task? As far as God and His Prophet are concerned, they have neither done it themselves nor given us any other criteria to judge the one from the other. The guidance Allah and His Prophet have given us is for all times to come and we have not been left free to declare certain portions of it to be eternal and universal and certain others as temporary and regional. If God has not given us any guidance to do this job, how is it to be performed? Would not severe clash of opinion arise on every turn and pass? Someone would rise and say that the injunctions about Ḥajj and Sacrifice were regional in character and were only a product of the Arabs' love for their ancestors. Some others would plead that the injunctions about *Zakāt* were meant only for a particular stage of human society and cannot be deemed as universal and eternal. Still others would make similar assertions about the Islamic injunctions in regard to marriage, divorce, *khula'*, *ḥudūd*, etc. What would be the device to meet these onslaughts on

Islam? If this strange logic is conceded, I am afraid, all the injunctions of Islam would dissipate into thin air and nothing would remain of the Divine Way of Life that is Islam.

The members of the Commission have also referred to the Islamic injunctions about slavery to support their contention. They say that slavery was held in veneration in a certain stage of human society, but after the abolition of slavery all the Islamic injunctions about it have automatically become infructuous. Now, neither there are slaves nor is there any place for the Islamic injunctions about slavery. Reading between the lines, the Commission seem to impress that with the evolution of society if the same happens with the injunctions about marriage, divorce, punishments, inheritance, etc., then there is nothing in it to feel worried.

The Commission, in their zeal to prove their principle of *Ijtihād*, have cited this example but have forgotten that the commands about slaves have become inapplicable only because now there are no slaves—persons for whose protection the injunctions were intended. Similarly, if theft and piracy are eliminated and there remain no thieves or robbers, nobody would hold that the punishment must be imparted to somebody to keep an injunction of Islam alive. Or if the curses of adultery and fornication are wiped out, none would say the *ḥudd* must needs be inflicted upon someone or other. If the need for which a law is given is not present, the question of the enforcement of that law does not arise. But if the need does persist, how can a law be changed merely on the plea that so much time has elapsed or that times have changed? If slavery has vanished, it is most welcome, and nobody would say that to implement the injunctions about slaves some slaves must be provided for. But what sense is there in the plea for the change of injunctions when the real needs which prompted them do exist in abundance. So long as theft and robbery prevail in society, how can anybody object to the Islamic punishments for these crimes? Evils of adultery and fornication infest the society and yet there are those who feel uneasy over the Islamic injunctions to check them. Interest and gambling are on the ascend but they are worried in regard to the Islamic commands about them. The real social, cultural and

moral needs of polygamy are present—nay, so pressing that all doors of promiscuity have been flung wide open and even concubinage and mistress-keeping have become permanent institutions in the modern world, yet there is the insistence that the Qur'ānic permission for more than one wife must be cancelled. After all, what sense is there in this kind of reasoning. I would like to know in what respects the society has changed. Have the evils which Islam wanted to curb and for whose check it laid down those injunctions been eliminated? Have these very evils not multiplied hundred-fold in the modern society? Or is it so that the 'change' in this respect is that those very evils have now begun to be adored as gems of civilisation? If this is the real nature of the change, then the *pseudo*-reformers must know that Islam and the Muslims curse this civilisation and these values of modernity hundred and one times and in these circumstances what Islam enjoins is that not only we must not be a party to this sort of scandal but that we must give an all-out fight against such a civilisation and lift such a curse off the brows of mankind.

Third principle: What is not categorically and unconditionally prohibited is permissible

The Commission have stated as their basic and accepted principle that 'what is not categorically and unconditionally prohibited by a clear and unambiguous injunction is permissible, if the welfare of the individual or of society in general demands it.'[1]

The principle has been presented as a basic principle of Muslim jurisprudence, but the fact is that it has not the least relevance to it. The principle which has been enunciated in the Muslim law is: By nature all things are permissible; prohibition or restriction is established in pursuance of the rules of the *Sharī'ah*. Now, this prohibition or restriction is based on an explicit injunction, or on the implied meaning of an injunction or on reasoning by analogy and precedent. The method which the Qur'ān and the *Sunnah* adopt to prohibit or disapprove the use of a thing is not merely that of a categorical command. There are so many ways of saying a thing. Sometimes the positive aspect of a thing is emphasised which automatically implies that its negation is not

1. *The Report*, p. 1204

permissible. Sometimes an injunction is given about a particular matter but the context reveals that the same command will hold good for all similar matters. Sometimes an order is given to prohibit a thing and along with this its reasons are also given—and this means that the same injunction will be applied to all those things which are the product of similar causes.

This self-made principle of the members of the Commission is pregnant with great dangers. If it is accepted, there is absolutely no need of discussion over *Ijtihād*, for it is wide enough to 'liberate' us from most of the restrictions of the *Sharī'ah*, for all those things which are not 'categorically and unconditionally prohibited' are permissible. Thus for the future and in respect of all that is not 'categorically and unconditionally prohibited' everybody has a free hand. And even from among the so-called prohibitions, so many would be written off because they are not without conditions. Now, if this line of reasoning is extended further, one may ask: Where is it 'categorically' written that woman cannot be the *Qawwām* (holding charge) over man, or that she cannot assume the husband's powers by taking over the responsibilities of dowry and maintenance? Someone may even ask: Where is it categorically prohibited that a woman cannot at one time have four husbands? None of these are categorically and unconditionally stated in the Qur'ān or *Ḥadīth* and by resort to this principle the neo-Mu'tazilites can easily torpedo the entire Islamic ideology.

Thus it is a misleading and mischievous principle and can have no place in Islamic jurisprudence. The Qur'ān has adopted a number of ways for giving out injunctions and all of them must be equally respected.

Fourth principle: Follow the modern pattern

The fourth principle of the Commission is that the socio-economic pattern of society having totally changed in the last thirteen hundred years, the solutions to the social and economic problems which were given in view of the primitive society of early Islam cannot hold good now. Therefore the need of the hour is to change in accordance with the patterns of our time. The Commission have been guided by the consideration that: 'The actual state of the socio-economic pattern has changed considerably

since the early centuries of Islam.'[1]

There is no denying the fact that so many changes have occurred in the socio-economic pattern and the need of our age is to discover Islamic solutions to our new problems. If the Commission have referred to these changes only to emphasise this need, then there is nothing to disagree with it. But if the Commission want to convey that any and every change is a welcome change and that we should transform ourselves and the Islamic ideology in accordance with these changes, I am afraid, no reasonable person will agree with them. There have been innumerable changes that have been retrogressive and are abhorrent to the teachings of Islam. Every lover of Islam would fight them and try to reform them. If the Commission regard every change as essentially good and ask us to change accordingly, they are taking a very wrong and dangerous plea. In that case we also fail to understand why the Commission have committed the mistake of repeatedly asserting that they do not want to say anything new and are eager only to represent what Islam says. If this new principle is accepted, then Islam ceases to remain that universal and eternal religion which it has time and again been called and no meaning will be left with the injunction: 'We have completed the religion this day and have chosen Islam as your way.' Then the only reasonable course is to discard Islam outright and not to waste our time and energy on a system that is obsolete.

The Commission have expressed themselves on this point very vaguely and have not explained in detail the blessings and achievements of the modern West's social and economic order which has so overwhelmed them that they are even prepared to discard the ideology of Islam. After all, what those blessings are? As far as we know, capitalism and socialism both have thrown human society into peril and convulsion and have robbed it of its poise and tranquillity. And if the Commission have before them the vision of any other society, then we would request them to make that known to ordinary mortals like ourselves, for in this Report nothing but blind imitation of the West has been suggested.

1. *The Report*, p. 1229.

Fifth principle: The necessity of new Sunnah *and new* Fiqh

Another principle propounded by the Commission is:

'The basic principles of human relations as enunciated by the Holy Book are valid for all times, but the mode of their implementation and application must vary along with the changing circumstances.'[1]

First of all, the honourable members of the Commission should have stated clearly and categorically what those basic principles are. The impression one gets from the entire Report is that nothing is 'valid for all times,' not even the Qur'ān. Therefore, it is very essential that those principles should have been stated categorically.

Secondly, we would like to ask their opinion about that 'implementation and application' which was done by the Holy Prophet or by the unanimous decision of the companions of the Prophet during the *Khilāfat-e-Rāshida*, whether such 'mode of application' is to be maintained or just brushed aside.

Anybody with any knowledge of the Qur'ān knows that the Qur'ān is not merely a collection of certain principles. It has also applied these principles to life and has envisaged a pattern of human society. Now, the *Sunnah* is nothing but the name of the application and implementation of the Qur'ān into practice by the Prophet of God himself. The same task was performed by the legists and the *'Ulema* in the following generations. Do the Commission, we must ask, want us to ignore the *Sunnah* and the *Fiqh*, silently and connivingly to pass by this Islamic path and evolve a new *Sunnah* and a new *Fiqh* by applying the Qur'an to life and society all anew ?

Sixth principle: Need of revision of Islam

The Commission have enunciated their sixth principle in the following words:

'The law and procedure about marriage, divorce, guardianship of the person and property of the minors and inheritance needs overhauling to create greater security and stability in family relations, and to help the helpless.'[2]

Beautiful words, indeed! But what this 'law and procedure' is? These laws do not merely consist of the *Ijtihād* of the later jurists but the greater part of these is contained in the Qur'ān

1. *The Report*, p. 1229. 2. Ibid.

and the *Ḥadīth*. Then there are those laws which derive their sanction from the consensus of the *Khulāfa-e-Rāshidīn*. And, lastly, there, is the *Ijtihād* of the jurists. Now if *all these* call for revision and modification, then it is clear that the Commission want to revise Islam in its entirety and not merely certain *Ijtihād* of the past.

As to the sympathy they have expressed towards the helpless and the oppressed, I shall try to throw some light thereon in my criticism of their recommendations. For the fact is that they have not only tried to disrupt the entire social order of Islam, but their recommendations will also be most injurious to the poor womenfolk and the other helpless for whom they have evinced so overflowing sympthy and concern.

Seventh principle: Revision and reform of the rules and practices of an early society

The Commission hold the view that the injunctions and permission given in that stage of human society when it was still in its infancy need be revised and changed in this modern age of advancement and civilisation and new restrictions need be imposed on the erstwhile permission. They say:

'Special social diseases require special remedies, and if any thing that was permitted by Islam because human society was yet in an early stage but not enjoined, has resulted in the abuse of a permission, the permission is to be hedged in again with conditions and restrictions that may tend to minimize the prevalent abuses.'[1]

Whether it be the injunctions of Islam or the permissions given by it, we believe that they are all based on nature and, as human nature has remained unchanged and unaltered the Islamic injunctions are also true for all times and climes. They are in accord with human nature and shall ever remain so. Islam has not ordained about things that are influenced by temperature and climate. Such things have been left to the discretion of the people of every age. These reformers now inform us that the Islamic laws contain such laws too as were meant merely for the age of human infancy and should now be revised and that some new restrictions should be imposed in accordance with the needs of

1. *The Report*, p. 1229.

civilisation. One may ask: Why be content with the mere imposition of some new restrictions, why not do away with this child's frock once for all? The dress of adolescence does not befit the adults and the fully grown!

Then comes the question that if the advent of Islam occurred in a primitive stage and because of this age of infancy it gave some 'childish' commands, why is it in respect of *some* only? Reason suggests that its entire scheme must have been meant for that particular stage of human society and, therefore, must suffer from this defect. And what sense is there in repeating parrot-like the lesson that was meant for and taught to children? With the advent of maturity things of the age of immaturity must end! If on the basis of this reasoning anybody were to suggest that the entire teachings of Islam should be discarded, what answer can be given to him? If this line of argument is accepted as correct, each and every injunction of Islam, be it about marriage, divorce, economy, polity, law or morality, can be dubbed by some turn-coats as meant only for an early stage of human society and, therefore, fit to be discarded now. Do the Commission want to open the doors to this sort of mischief?

Then again, does not this principle give the impression that God (may He forgive us) sent His Apostle much before time --long before the world was advanced enough to receive an eternal religion? And if the age of real advancement had to come after the last of the Prophets, does it not lend some support to those who plead for the continuation of the prophethood in whatever form that may be? Have the Commission given any thought to this aspect of the problem.

One cannot fail to appreciate the legal acumen of the new legists when one sees that the remedy they propose for the non-observance of certain restrictions is to add more and more restrictions. On the one hand, their complaint is that the legists of the past have made religion cumbersome by imposing innumerable restrictions and, on the other, they are themselves adding more restrictions of their own. If in the past there were four conditions, and they are not being fulfilled, they propose to add half a dozen more restrictions to cure the disease. Now, supposing these new conditions too are not complied with, what would they suggest

in that case? Would they abolish the permission altogether?

Another aspect which has escaped the attention of the very learned members of the Commission is that, on their admission, the conditions were fully respected by the people when society was 'primitive,' but with the advancement of society and the maturity of civilisation the conditions of justice are not being fulfilled. What kind of progress is this? In the early society government gave full freedom to the people and they abided by just and reasonable conditions with devoted honesty; but the modern state, which has regimented all aspects of human life is unable to get justice maintained even between two wives. If this is the blessing of the age of advancement and maturity, then the oracle of history would say that the age of adolescence was much better than this age of maturity. In that society people were conscientious enough to respect law and establish justice without the club of law hovering over their heads. In fact, they were the best of the human race and their epoch was much superior to this alleged age of maturity in which men behave in a way that should make even children ashamed of it.

Eighth principle: Istiḥsān

Last, but not least, is the principle of *Istiḥsān* on which these learned members have allegedly relied. There is no doubt that *Istiḥsān* is a principle of Ḥanafī *Fiqh*, but its meaning is quite different from what the Commission seem to have understood. Their view is that whatever law may be formulated in view of social good is *Istiḥsān* and that Ḥanafī jurists have upheld this as a principle of basic importance. I would like to make it clear that this is not what the Muslim jurists think of *Istiḥsān*. They are all fully agreed that *Istiḥsān* has no application where the guidance of the Qur'ān, *Sunnah* or *Ijmā'* (consensus) are available. Its importance lies only in the area of *Qiyās* (analogical reasoning), *'Urf* (permitted custom) and *Maṣliḥat* (rightful exdediency). Circumstances arise where *Qiyās* leads to one opinion while expediency demands a different course. In such cases a group of Ḥanafī legists prefer the latter to the *Qiyās* and this they call *Istiḥsān*.

Imam Shāfi'ī is dead opposed to this *Istiḥsān* and regards it as independent and absolute legislation which no one but God and His Apostle have the right to do. There is no doubt that if *Istiḥsān*

means legislation without any regard to any other consideration except mere social interest, as the Commission suggest, or on the principle of rejection of a properly derived *Qiyās* merely on the plea of expediency, then it amounts to absolute legislation and has no place in Islam. Islam acknowledges the role of expediency or necessity in a certain sphere and within that sphere it gives them proper opportunities to act and flower. In our individual and social life, in the ordinary course we have been given this freedom, provided it does not conflict with the injunctions of the *Sharī'ah* and the moral and social tenets of Islam. It is this sphere where the principle of *Istiḥsān* operates and this is what the Ḥanafī legists have upheld. This very principle has been named by the Mālikī legists as *Maṣāliḥ Mursalah*. Thus it is clear that there is nothing common between these principles of our jurisprudence and the new doctrine which the Commission have propounded.

5. COMMISSION'S RECOMMENDATIONS ANALYSED

I HAVE discussed in the foregoing pages the objectives and principles of *Ijtihād* as propounded by the members of the Commission. I now proceed to make certain observations in regard to their recommendations.

I shall particularly keep in view two basic considerations. I would like to discuss the arguments which the Commission have given in support of their views and assess the weight they really carry. Secondly, I would like to point out the results and consequences which are bound to flow if these recommendations are implemented. This is very essential to make those who are innocently and unknowingly pleading for the adoption of the Report realise its dangerous implications. The effects these recommendations are going to have upon the position and status of the women deserve to be studied very carefully and meticulously and I shall offer my own reflections in this respect as well.

Compulsory registration of Nikāḥ

The Commission recommend compulsory legal registration of every *Nikāḥ*. The method of registration suggested by the Commission (because of its simplicity!) is that there should be a

standard *Nikāḥ-nāmā* which should be widely published and made available at every post office against a nominal price (say eight annas). It should be in triplicate, to be filled in by the *Nikāḥ-khwān* in the presence of two witnesses. One copy should remain with the bride-groom, the other with the bride or her guardian and the third copy should be sent under registered cover to the Tehsildar of the area. The Tehsildar will have a register of marriages in which he will immediately make entries regarding the marriages thus intimated. It would be the responsibility of the *Nikāḥ-khwān* to send the *Nikāḥ-nāmā* to the Tehsildar and in default he can be fined up to Rs. 500.

This is what the Commission have suggested. Now, let us critically review their arguments.

The first argument which has been offered on religious grounds is derived from the verse about money transactions. The Qur'ān says: 'When you are borrowing or lending money for a stipulated period, you should reduce it to writing.' The Commission argue that 'the marriage contract is much more important than any mere commercial transaction as it includes a contract about *Mehr*.' As *mehr* is technically called *Dayn-e-mehr* (دین مہر), viz. a debt payable by the husband, there should be no doubt left as to the necessity of putting it to writing.

Naturally, one is prone to ask: How it is that, although God has given the instruction to reduce commercial transactions to writing, He has ignored to instruct writing of the *Nikāḥ* which, according to the Commission, is much more important? Is it so by mistake? Someone could raise this point, but I for one have no desire to enter into such questions and would like to confine myself to other aspects of the discussion.

If the Commission had suggested that it is commendable to bring the *Nikāḥ*-deed into writing, I would have fully endorsed the suggestion despite the discrepancies that infest the reasoning employed therefor; but when the Commission use the above-mentioned injunction to 'prove' that registration of marriages is *compulsory* and if a marriage is not registered it would be legally invalid, in spite of other conclusive evidences and proofs, then I cannot let it go unchallenged. The injunction concerned does not make the writing of commercial transactions *compulsory* and

inviolably binding. Nor has the non-writing of transactions been made a legal offence. Nor are those transactions which are not reduced to writing treated as illegal and unacceptable. What the verse says is that writing of these transactions is very commendable and through it evidence can be easily established and the chances of malpractice reduced to the minimum. My objection is to the making of the registration of marriages *compulsory*. The verse in question does not support this view. For when it does not make writing of commercial transactions compulsory, how can it be argued that the registration of marriages should be made compulsory. The argument is based on a logical fallacy.

The point which the Commission have tried to make out of the term *Dayn-e-mehr* is fictitious and superfluous. *Dayn-e-mehr* is not a religious term and has only been used by later Muslim writers. It is nowhere used in the Qur'ān and the *Sunnah*. The term used therein is that of *mehr* or some similar words. Rather, the very concept of *mehr* which the Qur'ān envisages is abhorring to the concept of debt. The practice during the days of the Prophet (peace be on him) and his companions was that *mehr* was paid at the time of marriage or immediately after it. It never lingered on as a debt. This concept is only a later development and if the original practice is given currency to-day we would be rescued from a legion of inconveniences and complexities. It is, however, unfortunate that we have developed a strange way of thinking: we have not only turned *mehr* into a debt but have baptised the idea into a legal and religious term, *Dayn-e-mehr*, and are now spinning legal quibblings on the point.

The Commission's second argument is rather reasonable. They hold that 'complex questions relating to the validity and existence of *Nikah* between certain parties arise very frequently in civil and criminal courts. It often happens that of two men each claims to be the husband of the same woman, in order to escape being convicted . . . for abduction. Difficulties also arise in cases relating to inheritance. Very often one of the claimants to a large amount of property dubs the defendants as illegitimate sons; and the case is difficult to decide for lack of all documentary evidence. In suits relating to maintenance, a great deal of orla evidence is produced to prove that the woman claiming

maintenance is not a legally married wife but a mistress or a keep '[1] The Commission argue that registration of marriages would provide an authentic record of marriages and the number of such cases of fraud and injustice would be significantly reduced.

As far as the occurrence of such cases is concerned, there can be no two opinions about it, but the mode of registration suggested by the Commission will, instead of reducing the number of disputes, multiply them. It would encourage false registrations and mischief-mongers would very easily cook up marriage registrations by arranging a *Nikāḥ-khwān* and any two witnesses. Anybody may get the form of *Nikāḥ-nāmā* from the post office and may send it under registered cover to the Tehsildar. In this way any woman or her guardians may be involved and the register of the Tehsildar would be a 'conclusive proof' against many an innocent person. In the present state of our society, no provision can be more injurious to the life and honour of respectable citizens than this innocent looking suggestion. It will give the goondas, adventurers and perverted elements a bumper opportunity to exploit the people. It will also open up new vistas of bribery and corruption and the influential elements—particularly the Zamindars, the Jagirdars and the capitalists—would be in a position to establish anybody's marriage with anybody and do whatever they like. The honour of the people, particularly of the poor class, would become a plaything, and as the procedure would be simple the number of cases in courts would increase hundredfold, so much so that in no time the courts, I am afraid, will start crying in bewilderment.

One could say that these are mere imaginary fears and might never come true. I would say: If this is so, then, why not adopt this very simple procedure for the registration of commercial and property deeds and about the letters of attorney and other ancillary matters? In the face of the simple system suggested by the Commission why is the present complex procedure being maintained in which each party is to be present in the court to affix its signatures? If, however, the answer to this objection is that these are matters of property and capital and it is not

1. *The Report*, p. 1208.

advisable to take them easy because if due caution is not taken so many fictitious transfers of property would take place and everything would be turned topsy-turvy, my rejoinder is: Is the honour of the people not even as important as their property? Why be so careful in regard to property dealings and so easy-going in respect of their honour, particularly when the Commission have admitted that 'the marriage contract is much more important than any mere commercial transactions'?

The register of the Tehsildar is being given the position of an authentic and conclusive record. The position being what I have stated, would that register be a record of authentic evidence or a jumble of false and fictitious reports? In fact, this record would be challenged in courts and instead of proving anything it would rather complicate the issues and make confusion worse confounded.[1]

The third argument which refers to certain precedents is that such provision already exists in the Parsi Marriage Act and is not also without precedent in Muslim history. It exists in Algeria and Hārūn al-Rashīd also insisted on it during his reign.

As far as the first example is concerned, I only pity the mental level of those who present the practices of Parsis as an ideal for the followers of Muḥammad (peace be upon him). Everybody knows that the Parsi community is the most westernised community of Asia and it has fully succumbed to the social practices of the West. There is all the difference in the world between the social life of the Muslims and that of the Parsis, and it would be the height of folly to think that the practices of Parsis can

1. This is a very important and very real danger and the record of the case-laws substantiates it beyond the least shadow of doubt. Let us refer to a recent case from the court of Raja Saleem Akhtar, P.C.S., Mianwali (case No. 24 2, of 1957). In this case two persons claimed to be the husband of the same woman and each presented the marriage register in his support which contained both the marriages. The learned Judge in his judgment rightly said: 'As regards the two nikah registers which have been produced in court during the course of hearing, I am constrained to remark that . . . their maintenance is most careless, so much so that the Board provides *the criminals especially the abductors with an easy and ready-made implement to use them for their ends.*'

The learned Judge further says: 'It would be better if the District Board *did away with the maintenance of these registers in the District rather than seeing the crimes of abduction promote and flourish through these registers.*' (Kalimullah *vs.* Allah Yar and Mst. Gulai, No. 24/2 of 1957).—*Editor.*

work as an example for the Muslims and that they can be given currency in Muslim society.

Algeria is in the grip of western imperialism and no law of that country can be presented as a precedent. They are not even free to control and maintain their own mosques which are under the control of non-Muslims. Would our *pseudo*-reformers be prepared to follow their example in this respect as well? The conditions of our country and those of Algeria are widely different and the example of the one cannot be applied to that of the other.

About Hārūn al-Rashīd, suffice it to say that he was wise enough not to implement the proviso despite his alleged insistence. It seems, he later on became conscious of the weakness of his opinion, otherwise who could stop him from enforcing this provision. He was too wise to take this risk, and our 'reformers' are so prudent that they want to *do* what even he, despite his verbal insistence, scrupulously avoided.

I have offered my own evaluation of the arguments of the Commission and it is now for the reader to judge matters for himself.

I will now briefly refer to the evil consequences bound to flow if this rcommendation is adopted and enforced.

(1) The very first consequence would be that all those marriages which are not registered would be illegal and void and the children born as a result of such marriages would be illegitimate. These children would also be deprived of their rights of inheritance. It is clear beyond all doubt that this is in conflict with the law of the *Sharī'ah*. The *Sharī'ah* sanctions every marriage which is performed in the presence of at least two witnesses and confers it with full legal title. Thus a conflict between the *Sharī'āh* and the law of the land would ensue. A marriage that would be legal and valid under the *Sharī'ah* would be deemed illegal and void according to the law of the land. A person whom Islam would regard as a rightful inheritor would be deprived of all inheritance under the law of the land. This would be a bery grave situation and a severe strife would follow between the *Sharī'āh* and our laws—and it would be a clear violation of the Constitution which envisages that the *Sharī'ah* should constitute the law of the land. Do the members of the Commission want this conflict to rage? Do they want to

make what Islam regards valid and legal a crime according to the law of the land?

(2) It would also provide the goondas and the mischief-mongers with profuse opportunities to play with the honour of respectable citizens as I have pointed out earlier.

(3) It would multiply the crimes of abduction and forced marriages and a flood of new cases and legal disputes would surge into law courts.

(4) To safeguard against the dangerous consequences of this provision the next step which the authorities will have to take would be that of adopting the same procedure for the registration of marriages which is now adopted for the registration of property transactions. Under this system the bride, the bride-groom and their guardians will either have to go to the court to legalise the marriage or to call the magistrates to their own place incurring heavy expenditure. This is what must happen in future, and I wish the Commission had made it clear so that the people could know where these recommendations are going to lead them to.

(5) The majority of our people live in small villages and the illiterate rural population, which even now is unable to find out proper *Nikāḥ-khwāns*, would be thrown into the grip of innumerable new problems and complexities. Everything would become so complex and confused that one would have to seek the help of a lawyer and without that it might not be possible to proceed. This would entail heavy expenditure. And as the *Nikāḥ khwān* would always be under the threat of fine, no gentleman would be prepared to hazard the risk. As such the common folk would have to fall back on the professional *Nikāḥ-khwāns* of the cities and will have to spend a lot of money and labour. The facts of our rural life have not at all been kept in view while making this recommendation which, if it is enforced, would bring a host of new problems and complexities and would serve no good purpose. The problems which the Commission want to solve will remain unsolved and unameliorated, and to add to their difficulties new problems would crop up. In short, this 'cure' is worse than the disease and we must not risk our social life at its altar.

Age limit for marriage

To prevent child marriage the Commission have proposed

that a legislation be enacted to the effect that 'no man under eighteen and no woman under sixteen shall enter into a contract of marriage.'

In support of this suggestion the Commission have put forth a Qur'ānic argument. They have quoted the verse: 'When the orphans attain puberty (بلغوالنكاح), their property should be handed over to them if you find that they have also developed sufficient maturity of intelligence' (فان آنستم منهم رشداً). They argue: 'The Holy *Qur'ān* [in the verse quoted above] makes not only puberty but a definite stage in the development of intelligence as a condition precedent for entrusting property to the orphans. The question of marriage may be decided on the same footing because the entrusting of the life of marrying-parties to each other is an affair of greater importance than mere entrusting of property.'[1]

One can only wonder at the 'understanding of the Qur'ān' demonstrated by these legists *par excellence*. When the Qur'ān has used the term بلغوالنكاح it automatically means that the Qur'ān regards puberty as the proper and sufficient limit for *Nikāḥ*. The position has been made clear by the term itself and there is no need of any other explanation to elucidate the proper age for marriage. Here a categorical *nass* is available, and this leaves no ground for difference or controversy.

The word *Rushd* in the context in which it has occurred means intelligence and capacity to look after the affairs of business and property and to be able to control its administration. This condition has been laid here to make sure that the orphans are so grown up that they can look after their affairs and protect their interests. But it does not mean that the person concerned should also not be married. In case of unmarried life there is very much danger of one's going astray. In case of being married the possibility is that he may not only prove a good husband but also develop proper sense of responsibility and be able to supervise his other interests also.

One could pertinently ask how the Commission have assessed that every man attains *rushd* at the age of eighteen! There are many who become mature much earlier and, on the other

1. *The Report*, p. 1209.

hand, there are many who do not grow mature even at the age of twenty-two and twenty-four. If maturity of thought and intelligence be an essential condition for marriage, then, perhaps, thirty and not eighteen would be the proper age-limit.

The Commission's second argument is that as the Qur'ān has not prohibited the setting of the age-limit, therefore they are entitled to fix such a limit. Here the Commission have resorted to one of their golden principles of *Ijtihād*, viz. 'that what is not categorically and unconditionally prohibited, is permissible.' The Qur'ān has not categorically declared that no age-limit should be fixed for marriage, therefore, it is permissible to set such a limit. I have already discussed the absurdities and fallacies inherent in this principle and need not go into them here. I would, however, like to ask the Commission a question in the light of their own principle. Has the Qur'ān anywhere categorically or conditionally declared that marriage below the age of eighteen or sixteen years is prohibited? If the Qur'ān has not prohibited it, is it not permissible according to their own principle? If it is permissible, how can it be prohibited? Who has given the Commission the right and authority of making the unconditional conditional, limiting what is unlimited and prohibiting what is legally permissible?

Perhaps the members of the Commission had some awareness of the weakness of their case and they have therefore tried to derive support from another self-made principle. They argue that as the society in that period was in its early and infant stage, Islam did not prohibit child marriage, although it wanted to do so. Keeping the stage of society in view, Islam did not prohibit such marriages and left it for the mature age of Khalifa Abdul Hakim to improve and complete the religion of God by filling up the lacuna. They therefore say: 'Child marriages were not categorically prohibited by any injunction because in certain stages of social development they may be comparatively harmless.'

Let us concede for a moment that at the advent of Islam human society was in its adolescence. The question still remains: Why were early marriages not so injurious in that age and have now become so very harmful? Is it so because in that period of

immaturity men did not attain puberty before the age of eighteen? Or was it so because in that period the standards of morality and modesty were so lax that boys were unable to control their passions and now the standards have become so high that the dangers of aberration now no more exist? Or is it because that in primitive age some 'foolish' ideas of modesty, chastity and clean and pure life so 'obscured' the minds of the people that they used to marry their boys and girls after puberty and to provide them with set patterns to live a married life, but now the advancement of civilisation has so dissipated those 'superstitions' that at least up to the age of sixteen or eighteen there is no need of any limitation upon their freedom?

As the Commission have not clearly stated the reason why they regard early marriage as harmless in that stage of society and harmful now, I am not in a position to say which of these reasons is deemed important and real by the Commission. But if the members of the Commission are under some illusion about the moral state of contemporary society, I would like to ask them to shake off the illusion as early as possible. They must know what the U.S. statistics, provided by the Federal Bureau of Investigation, reveal about teen-agers. These statistics show that the highest number of cases of rape, fraud and murder are committed by teen-agers and the highest 'contribution is of those whose age is seventeen years.' This is about the boys but the girls are a step ahead of them. The number of girls below eighteen who are involved in crimes has increased three times after the Second World War. And if the members of the Commission want to know the sexual anxieties of teen-agers, I would suggest them to go through the pages of Kinsey Reports where it will be found that in the modern society sexual urge is to be found awakened in cases even at the age of five years and by the time boys attain the age of sixteen they play havoc with society. In fact, it is difficult even to comprehend what the teen-agers to-day are doing and what their real moral standard or social behaviour is. In the face of these facts one fails to understand how the Commission regard early marriage, which fortifies the social life of man and woman, as injurious and harmful and out of consonance with modern standards.

One could plead that the period one has to devote to education being quite long and marriage during student life being inadvisable this suggestion is worth adopting. I would, however, like to clarify that the custom of early marriage is not at all prevalent in our cities or towns. Rather, the complaint about the educated people is that they marry very late—so late that some women have even to give up the very idea of marriage. It would be generally agreed that there is no need of any law for this section of our society. Thus if the law will have any effect, it will be upon the rural population where early marriages are in vogue. But here too the custom is very different from that of the Hindu society where the practice is that of *child marriage*. In rural Muslim society it is not child marriage but early marriage that prevails and marriage is performed only after puberty has been attained. The practice is that after the boys and girls come of age, the parents, who are living a life bordering on poverty, try to marry them and thus be freed from their responsibilities. I do not understand *why the Commission want to stop this practice by the force of law*. If there are some loopholes in the present system they will naturally be filled up through the spread of literacy and education and better dissemination of Islamic teachings. After all, what is the need of bringing into action the fierce rod of law?

Now I would like to point out some of the major evils that will follow the enforcement of the law setting the age-limit.

(1) Its greatest harm would be that something which is permissible (*ḥalāl*) in the *Sharī'ah* of Islam would become prohibited (*ḥāram*) under the law of the land. Our courts would declare null and void all marriages between those who are younger than the legal limit, would deem the issues of such parents as illegitimate and would deprive them of inheritance rights. All this would be in clear contravention of the *Sharī'āh* and this conflict between Islam and the law of the land would be extremely injurious to our society.

(2) This law cannot be enforced unless birth registers are also strictly maintained. In view of the low percentage of literacy in Pakistan (it is about 17%), it would only add to the inconveniences of the common man to put the law into force. The rural population—which is 85% of the total population—would regard

it as an unnecessary burden.

(3) This would give a new impetus to crimes of fornication and abduction, particularly in rural areas. Landlords and other influential elements, with rare exceptions, are a constant danger to the honour of the poor peasantry of our country. They, therefore, often marry their girls immediately after puberty. With the passage of this law, they would be compelled to keep their young girls unmarried till they cross the age-limit and heaven alone knows what calamities would befall them. Let us not shut our eyes to these hard facts. Let us not live in the sweet world of imagination. In the present state of our society, our poor people would be left entirely at the mercy of circumstances in matters of their honour. Where do we want to lead them to?

(4) The new social complexities which must follow the enforcement of this law would be extremely perplexing. Just a few illustrations would suffice. Suppose there is a poor man suffering from extreme paucity of means. He is living in cringing poverty and wants to discharge the responsibility of marrying his adult sons and daughters. He happens to have a suitable match for his daughter, but he cannot marry her because of this law. By the time the girls attains the legal age of marriage, the match may not be available and his means may also betray him. His plight can best be imagined than described! Do we want to throw our people into such a situation?

To take another common instance, there is a man who is suffering from a fatal disease and has no hope of life. He has an adult daughter and is afraid that his heirs may not treat her fairly after him. He is eager to marry her to someone during his own life-time and thus be freed from this heavy burden. Now, this law would again come in his way and the poor girl will be left in the cruel hands of Fate.

Or, say, there is a widow who has an adult daughter. There is no other guardian or protector of the family and the widow is afraid that, if she does not marry the girl, the bad element might create trouble for her. This 'benevolent' law again will hold her hand and she will have to live under the dismal shadow of this threat.

Or there is a God-fearing, conscientious man of high morals,

and finds out that his son has fallen in bad company. He feels that if he immediately marries the boy he could be saved and the evil nipped in the bud. Now because of this law (for the boy, although of age, is under 18 years) the conscientious father will be rendered helpless and he will be unable to save his son.

These are not mere suppositions or figments of imagination. Such bitter and unwholesome cases are bound to crop up in thousands and throw the entire society into convulsion.

(5) It will accelerate the already swift pace of moral degradation of the nation. The atmosphere of schools, colleges and hostels would become more polluted. Crime and prostitution would increase. Unnatural and health-destroying ways of sexual satisfaction would become common. Corruption would mount high and abduction and fornication would assume menacing proportions. These consequences, which the Commission seem to have conveniently ignored, are bound to flow. And what is more baffling is that while the Commission are so eager to impose restrictions on marriage before a certain age, the idea of putting any restrictions on *zina* (fornication) does not at all strike them.

(6) Another aspect of the problem is that all such persons whose adult sons and daughters fall a prey to sinful life or behaviour because of this law would become sinners in the eyes of the *Sharī'ah*. Our Holy Prophet said:

'Whomever God has given children is enjoined to give the child a good name, train him and bring him up in the best possible manner and marry him when he becomes adult. And if he is not married and falls a prey to sin, then his father would be responsible for that sin.'

In the light of this injunction of the Holy Prophet, let everybody think for himself if he is prepared to shoulder this responsibility, for everyone who keeps mum over the proposed law will have to bear the responsibility of it.

(7) Enactment of such a law in our country would (God forbid) amount to a virtual vote of condemnation on our part against the Holy Prophet and his topmost companions. For the Holy Prophet himself married Ḥaḍrat 'Ā'isha Ṣiddīqa when she was under sixteen and 'Umar Fārūq married Umm Kulthūm, the daughter of 'Alī, when she was under sixteen. When our younger

generation would read these events of our history against the background of the proposed law, would the impression not be cast on their minds that those choicest ancestors of ours and even the Holy Prophet of Islam were (God forbid) 'criminals' according to our law?

Woman's right to divorce

The Commission suggest that 'it should be enacted that it is lawful to provide in the marriage contract that the woman shall have the same right to pronounce divorce, if the right to do so has been delegated to her in the marriage contract, as a man.' In support of this contention the Commission have tried to drag in the doctrine of *Tafwīḍ* and have also searched out a quotation from *Sharḥ Waqāyā* that 'if the husband has said to his wife that she can divorce herself whenever she likes, this right of the wife becomes absolute for the whole of her life.'

Before discussing this argument, let us be clear about a few points of principle in respect of marriage.

First, all those new-fangled conditions and restrictions which do not come into the orbit of moral and natural dictates of marriage are against the spirit of Islam. It is the responsibility of man to perform the duties of husbandship, to bear the expenses of the home, to look after the health and comfort of the wife, to give her the best that he has and, if he has more than one wife, to be just to all of them. These are the natural demands of marriage and they must be fulfilled because of the promise that man has made to his Creator. These have got to be upheld even if they are not written in a 'Standard Marriage Form.'

Similarly, it is the responsibility of the wife to have full regard for the needs and sentiments of her husband, to look after his house and children, to protect the marriage bed, to become a real partner to him—a true sharer of his joys and sorrows. These again are the natural demands of matrimony and woman is bound to fulfil them because of her contract with Allah.

It is totally out of tune with the spirit of Islam that some unnatural restrictions or conditions should be imposed upon the husband and the wife over and above the natural demands of justice and matrimony and the limits set by God. Such conditions would impair the mutual relationship of the spouses and, instead

of love and amity, discord and suspicion would creep into their hearts from the very outset. And if the seeds of distrust are sown at the very dawn of matrimony, how in future can a good and prosperous life blossom forth? As far as the *Ḥadīth*: 'The conditions most deserving of fulfilment are those that are attached to the fact and the act of marriage,' is concerned, it has no relevance to the novel and new-fangled conditions our reformers are trying to impose. It simply relates to conditions which are naturally attached to marriages and have been stated in the Qur'ān and the *Sunnah* quite unambiguously. That is why 'Alī expressed the opinion that all those conditions which do not occur in the Holy Book are void.

Secondly, all those conditions are void which, according to the Islamic law, are in utter conflict with the dictates of matrimony, or which are bound to frustrate and destroy that scheme of matrimonial life which God has sanctioned for us. There is some difference of opinion among our legists on the point whether such conditions alone are void or the *Nikāḥ* also becomes void. Anyway, all are agreed that *such conditions are definitely void.*

It is an accepted principle of the Islamic law that no such conditions can be inserted into the marriage-deed which disturb the rights and duties of the spouses, for they have been enjoined by God and are based on nature. The right to divorce has been entrusted to man on these very bases and on the principle that the husband has been given supremacy over the wife (بما فضل الله بعضهم على بعض). If the nature of man and of woman is what it is and is not interchangeable, their rights and duties too cannot be transferred by any trick or jugglery. Man should perform the functions assigned to him, and woman should perform those assigned to her. Any unnatural transfer of rights and duties cannot but disturb the family life and would produce nothing except chaos and confusion.

After these general observations I would now proceed to offer my reflections on the problem of *Tafwīḍ*.

The first question that I propose to raise is: Is this method of *Ṭalāq* just, proper and natural?

Let us for argument's sake concede that if a man happens to say to his wife: 'You may confer unto yourself three *Ṭalāq*s whenever

you like' (طلقی نفسک متی شئت), the wife becomes entitled to divorce herself whenever she likes and leave the husband's house. Now I would like to ask the members of the Commission, who regard three divorces in one sitting as an evil innovation, whether this method is in conformity with the Islamic method of divorce. Is this the way the Qur'ān and the *Ḥadīth* have shown us? Is it in tune with the spirit of Islam? And do they want that the very inauguration of the matrimonial life should be performed with this blank cheque for divorce? Even a little reflection would reveal that these words cannot be uttered except by one who is fed up with his wife. I wonder how a sane person can even think of making a religious tenet out of this word of utter disappointment. Marriage is performed to achieve amity, happiness and contentment of heart and soul. Islam has tolerated divorce as the most unpleasant of all permitted things. Now, do these honourable members propose to inaugurate marriages with this arrangement for divorce—an arrangement which is in itself silly and revolting?

Secondly, if we accept this sentence of the *Sharḥ Waqāyā* as a religious tenet, the question arises: In what manner and with what authority will the woman use this right? If man has *transferred* this right to her, what remains of this right with the husband? If it has been transferred, then he is left with no power and authority. And if per chance there arises a need for the use of this right—and there are cases where he *must* use it according to the *Sharī'ah*— what is he to do? Will he go to the matrimonial court to seek *Khula'*? Or would he willy-nilly drag on with the same wife? If it were to be said that these complications would not arise because both will enjoy this right simultaneously, then surely it is not *Tafwīḍ* (transference of a right) but a *Tashrī'* (new legislation) which we are not empowered to do. This power and authority has been given by God only to man and by this trick we are trying to extend it to a place beyond the scheme of the Law-giver. In fact, this right is not transferable.

One could say that just as a man can appoint anybody as his agent for *Nikāḥ*, in the same way, in respect of the conferment of *Ṭalāq*, he is entitled to give this authority to the wife. It would be simply a case of attorneyship and should be permitted. My objections to this plea are as follows.

First of all, according to the Ḥanafī law, an attorney can be appointed only when the principal is unable (because of illness, absence or any such reason) to perform the task himself. In case he can perform it himself, then there is no question of the appointment of any attorney. Now, why should a man make the wife agent for the conferment of divorce? What is the reason behind such move? Is the man incapable of pronouncing it? Is his absence the cause of it? Or is he devoid of the courage and the ability to pronounce divorce?

Secondly, according to the Mālikī and Shāfi'ī law, a woman cannot be appointed as agent in respect of *Nikāḥ*. If this is so about *Nikāḥ*, it would be hundred times more true in the case of divorce. For, here the woman is given the power to confer divorce upon herself. And none but an idiot would appoint the 'defendant' as his attorney!

Thirdly, even in the case of attorneyship the husband cannot use his right to divorce unless he cancels the power of his attorney or the attorney herself returns the right to him. In the recommendation of the Commission there is no place for the cancellation of this authority by the husband. If the woman herself returns this right, she would be left with none, and if she does not, the husband would be left deprived of this right. In any case, the proposal fails to procure equality of rights to the two.

Another question that arises is: In what form would this condition be inserted into the marriage-deed? Would it be compulsory for everybody to make this *Tafwīḍ* or would it be left to his free choice—i.e. would he be free to accept or reject it? If it is to be the latter, there would hardly be found any person in our society who would commit this folly. And if it is to be compulsory and everyone is to be compelled to accept this condition, then it would not be *Ṭalāq-e-tafwīḍ* but *Ṭalāq-e-mukrah* (divorce under duress) for he would be *compelled* to confer a right upon the wife which according to the *Sharī'ah* is only his.

And this *Ṭalāq-e-mukrah* is the same thing against which Imam Mālik raised a strong protest and was subjected to the severest tortures by a despotic 'Abbasid caliph. He braved all punishments and infamies to declare that such *Ṭalāq* has no validity in the *Sharī'ah*, that it is null and void and that mere brute

force of the powers-that-be cannot make it legal.

Maybe somebody says that some legists have not taken so strong a view of *Ṭalāq-e-mukrah*, rather some have even held it legal; therefore what harm is there in incorporating it in our family law? I would submit that this is not the position; even those few legists who have accepted such *Ṭalāq* as legal have only *tolerated* it and that too *not in all cases*. They tolerate it only in cases where the person concerned is forced to do this and there is no legal remedy available against this duress. It is only in such a situation that those legists have accepted such *Ṭalāq* to avoid graver complications. For instance, a despotic ruler compels a man to divorce his wife. If this divorce is not regarded as legal, the second marriage of the divorced wife would be tantamount to fornication and her issues would be illegitimate. It is to avoid this situation that they accept this kind of *Ṭalāq*. This therefore is the position of those legists who accept it and they too do not approve of it in all forms or as a normal course. Anyway, I think that even this position is not tenable because if the effected parties have been forced into this situation and are not a willing party to it, they have nothing to fear on the Day of Judgment and as far as the complications arising out of such a situation are concerned, they are to be faced. The 'forbidden' cannot on this account be made 'permissible.'

I would even go to the extent of saying that even if some legists have tolerated such a situation, how does it mean that this is desirable in Islam that it should be adopted as the ideal form and that everyone should be compelled by law to conform to it? Has any school of thought among Muslim jurists sanctioned this as well?

Lastly, I would like to warn that if this method is adopted it will spell disaster to our family life. It is difficult even to imagine the baffling situation that would arise out of it. In normal course, if a man divorces his wife he has to think a thousand times before he does so. He has before him the question of his honour and fair name in society, the problem of children and their up-bringing, the advantages of homely life, the problem of *mehr* and the like, and cannot dare divorce unless left with no other alternative. In case the right is transferred to the wife, she

may, even at a slight provocation, confer on herself the three divorces and leave the house. She is not faced with the problems and responsibilities that confront the husband. She is not to bear the expenses of the maintenance of children and of *'idda*. Nor is she to pay the *mehr*; rather the possibility is that she might receive something from the husband. The Commission has put the restriction on the husband that he must explain to the court why he wants to divorce his wife, but there is no such restriction on the divorce that is to be pronounced by the wife. And why after all should they impose any condition upon such a divorce because there is no reason to fear any act of irresponsibility on the part of woman! It is man alone who is responsible for all sorts of irresponsibilities and evils!

Three divorces at one sitting

The Commission have recommended that three pronouncements of divorce at one sitting should be deemed as one pronouncement only and that it should be legally provided that only such divorces should be held valid in law as have been pronounced in three *ṭuhrs*. In support of this view the Commission have quoted a well-known *Ḥadīth* related by Ibn 'Abbās that during the period of the Holy Prophet, the first Caliph Abū Bakr, and partly of 'Umar three pronouncements of *Ṭalāq* at one sitting were regarded as only one pronouncement. 'Umar made three pronouncements at one sitting as an irrevocable *Ṭalāq* as a punitive measure to punish those who had made a vain sport of the injunctions of the Holy Qur'ān and the *Sunnah*.

The Commission hold the view that whatever be the reasons for this stand of 'Umar, it constituted an innovation in religion and a bad innovation indeed, for every *bid'a* is evil. The Commission have also claimed that 'Umar repented later on as the change introduced by him was not strictly in accordance with the Holy Qur'ān and the *Sunnah*, and it made divorce easy for those who wanted to indulge in it.

My observations on this issue are as follows.

As far as the question of irrevocability of the divorce pronounced thrice at one sitting is concerned, all the four *Imams*, most of the companions of the Prophet, the *Ṭāba'īn* and the *Fuqahā* are unanimous in their views. Among the first four Caliphs,

'Uthmān and 'Alī held the same opinion. And most interesting of all this is that Ibn 'Abbās, the companion on whose *Ḥadīth* the entire structure of the argument has been reared, himself held this view. Among the later legists nearly all of them except Ibn Ḥazm, Ibn Taimīyya and Ibn Qayyim are in favour of this view. I hold Imam Ibn Taimīyya in great esteem and veneration but as far as this point is concerned, after a thorough study of his writings and those of his disciple Imam Ibn Qayyim, I have come to the conclusion that the view of the majority of legists as against that of Imam Ibn Taimīyya is more in accord with the Qur'ān and the *Sunnah*.

A careful study of the traditions of the Holy Prophet conclusively shows that the claim that during the period of the Holy Prophet three such pronouncements were always taken as one is totally untrue. In some traditions it is said that three pronouncements were taken as one pronouncement and in others—whose number is much larger—it is reported that three or more pronouncements at one sitting were held as irrevocable divorce. Why this difference? Is it—God forbid—because the Holy Prophet made contradictory pronouncements or is there some difference between the two kinds of divorce, one of which was held to be revocable and the other irrevocable? The fact is that the two kinds of traditions refer to two different kinds of cases. In one the situation was that somebody got up and said to his wife, 'I give you three divorces' or 'one thousand divorces' or 'as many divorces as there are stars in the heavens.' In all such cases where the *number* (three or more) was specified, the divorce was held irrevocable. The other situation was that somebody said to his wife, 'I divorce thee; I divorce thee, I divorce thee.' Here the number was not specified and it could be thought that the person concerned has made only one pronouncement and has repeated the words more than once only for the sake of emphasis. And as divorce is the most unpleasant of all permissible things, the Holy Prophet gave the benefit of doubt to the divorcer. In such cases he used to ask them whether they meant one or more pronouncements of divorce. If 'one' was meant, he made the divorce revocable and gave them the benefit of intention. In cases where the number was specified, the divorce was invariably held as irrevocable. Moreover, the

Holy Prophet used to say in cases where more than three pronouncements were made that for effecting a divorce only three divorces were sufficient and it is up to Allah to forgive or to punish for other pronouncements. After all, Islam cannot allow making a sport of marriage and divorce.

This was the situation during the time of the Holy Prophet. Now let us see the nature of the change brought about by 'Umar and which has been referred to in the tradition related by Ibn 'Abbās. What he did was that when he came to know of innumerable cases of carelessness in the pronouncement of divorce he made both kinds of divorce as irrevocable without going into the question of the intention of the pronouncer. This he had every right to do because the consideration for intention was a concession which was given to provide extraordinary relief to those who might have done so because of ignorance or mistake. But when, even after repeated warnings, the malady continued and assumed the form of a menace, 'Umar withdrew the concession. The people had begun making a sport of divorce which could be checked only in this way. A dishonest person could easily defraud others through these tactics. When, therefore, 'Umar fully realised this menacing danger, he closed its doors and began to enforce such divorces. This decision of the Caliph was fully endorsed by other companions and *ijmā'* was achieved on this point.

During the time of the Holy Prophet nobody dared speak a lie before him but how could 'Umar judge that people were not telling lies and trying to use such pronouncement as a threat or as a trick against their wives? Caliph 'Umar, therefore, very rightly decided to treat both kinds of pronouncements as similar and irrevocable and this closed the doors to a malpractice.

Now the question arises: Was that a *bid'at* and a bad innovation? If it was, it is hard to imagine that all the companions of the Prophet, the legists of every age and the juris-consults of every epoch should subscribe to it. 'Umar was no despot. The Commission admit that even an ordinary woman could criticise him in the open. Then how did the companions of the Prophet and leaders of the ideal Islamic community tolerate it and did not even utter a single word against this evil innovation? 'Umar is not

alone in holding this view—both of his successors enforced this very decision and the *'Ulama* and *Fuqahā* of all the following generations have upheld this view. If such a view is 'bad innovation,' and the entire *Ummah* has subscribed to it, how is this view tenable in the face of the tradition of the Prophet: *'My* Ummah *cannot have consensus on evil'*? And if 'Umar realised his mistake, as the Commission allege, why did he not change the order? In case it was missed by him, how could 'Uthmān and 'Alī overlook it? In fact, this assertion of the Commission is simply incorrect.

Now let us see why some of the legists have called such a divorce as *Ṭalāq-e-bida'ī*. Here *bid'at* does not mean an evil, bad or undesirable innovation or as something against Islam, but is used as a technical term meaning that the method of *Ṭalāq* which, although legal and permissible, is not totally in accord with the method taught by Allah and His Prophet.

A careful perusal of the *Sharī'ah* reveals that there are two ways of following the religious injunctions. One is the way the Holy Prophet followed. This is the ideal form and is technically known as *Sunnah*. But the same injunction can also be followed in such a way that, although nothing significant is left out or violated and the act remains legal and permissible, yet it is not in full accord with the way the Holy Prophet did it. This latter is not the ideal way but if it is not in contravention of the *Sunnah*, it is permissible. As the *Sunnah* is the ideal, our religious reformers have always been trying to make the way conform to it *in toto*. To substantiate the point, let us take the case of *Wuḍū* (ablution). One is the way in which the Holy Prophet performed it and that is the ideal. But if anybody leaves some of the *mustahabs* or makes some change in 'sequence,' the *Wuḍū* would even then be valid, although it would not conform to the ideal and the most desirable form. Similar is the case with other religious practices.

Now, let us look to the question of *Ṭalāq*. One is the method which has been taught to the *Ummah* by the Qur'ān and the Holy Prophet and this method is the ideal one. But if a *Ṭalāq* does not conform to it *in toto*, then it is not necessarily void and illegal. Such *Ṭalāq*, although still valid and binding in law, would

be devoid of the blessing of the ideal system. That is why, when some such cases were brought to the notice of the Holy Prophet, he declared that, although *Ṭalāq* has been effected, it involves a violation of the *Sunnah*. He warned the people against haste and carelessness in *Ṭalāq* and declared: 'This is irresponsible playing with the Book of God while I am still present amongst you.'

Thus there were two methods of pronouncing *Ṭalāq*. One was the ideal way, that of the *Sunnah*, and the other involving a deviation from the ideal way although still legal and binding. For the first the term *Sunnah* was used, but what should the latter be called? It was called *Ṭalāq-e-bida'ī*. *Bid'at* here does not mean *Bid'at ḍalālah* (an evil and undesirable innovation) but refers merely to its deviation from the ideal. Had it meant evil innovation, how could it be deemed permissible and how could this very term be used by those who do not regard it as *bid'at*. Thus the word *bid'at* has been used in a certain sense here and it does not mean bad innovation. This is further borne out by a careful study of all the traditions of the Holy Prophet relevant to this topic. I, therefore, give below all the relevant *Aḥādīth* which throw light on both the methods. They are being presented from the well-known book of Ḥadīth *Nailul-autar*.

First of all, let us take those *Aḥādīth* which prove that three or more pronouncements at one sitting do constitute an irrevocable divorce.

'It is related by Ḥasan that 'Abdullah ibn 'Umar made one pronouncement of *Ṭalāq* to his wife while she was menstrous and had decided to make the other two pronouncements during the following *ṭuhrs*. When the Holy Prophet came to know of it he said, "O Ibn 'Umar, God has not enjoined to give divorce in this way. This method is a deviation from the *Sunnah*. The proper method is that you wait for the *ṭuhr* to make the pronouncement and then make one pronouncement in every *ṭuhr*." 'Abdullah bin 'Umar says that he intended to return to his wife in accordance with the command of the Holy Prophet. Then the Holy Prophet said, "No, when your wife is purified, you have the right to give the *Ṭalāq* or keep her." Ibn 'Umar asked: "Tell me, O Prophet of God, if I had completed the three pronouncements, would it have been proper and permissible for me to return to my wife." The Holy Prophet replied, "No, the divorce then would have become complete and irrevocable and you would have incurred sin for pronouncing *Ṭālāq* in the improper way." ' (Related by

Dārqutnī).

'It is related by Suhail that a brother of Banī Ajlan affected *lian* with his wife. He said, "O Prophet of Allah, I would be a transgressor if even now I keep her as my wife. I divorce her, I divorce her, I divorce her." (Related by Aḥmad).

'It is related by 'Ubaidah bin Samāmah that his grandfather gave one of his wives one thousand divorces. This the reporter narrated to the Holy Praphet who said: "Your grandfather had the right to give three *Ṭalāqs*, the remaining 997 are totally unjustified and uncalled for. Now it is up to Allah to forgive him on this transgression or to punish him for it." '

In another tradition, the same thing has been expressed in the following words: 'Your father did not fear Allah Who might have showed him the way. Only three pronouncements would have been sufficient to separate his wife. But he has behaved against the *Sunnah*. Now, he is responsible for 997 extra *Ṭalāqs* and will have to bear its punishment.' (*vide* 'Abdur Razzāq).

Those who do not subscribe to the view discussed above rely upon two *Aḥādīth*. One of them (i.e. the one related by Rakana bin 'Abdullah) has been referred to by the Commission also. This *Ḥadīth* has been related in two ways. According to one of them, he gave three divorces but after ascertaining his intention the Holy Prophet said that they were equivalent to one pronouncement only. This very event has been narrated by Abū Dawūd and Dārqutnī as a case of *Ṭalāq-e-albatta*[1] and as in such divorces the decision is made according to the intention of the divorcer the Holy Prophet enquired about his intention. When he said that he never meant more than one pronouncement, it was declared as revocable. Abū Dawūd has narrated it in the following words:

'It is related by Rakana bin 'Abdullah that he pronounced *Ṭalāq-e albatta* to his wife and while reporting this event to the Holy Prophet he told him on oath that he never meant more than one pronouncement. The Holy Prophet said, "Do you swear that you meant only one pronouncement and not more?" He replied, "By God, I intended only one pronouncement." After that the Holy Prophet asked his wife to return to him.'

1. *Ṭalāq-e-albatta* is that divorce in which a man says to his wife: 'I give you definite divorce.' Now he will be asked to tell if by definite he meant three pronouncements or only one and used it merely to enhance the emphasis. If he says that he meant only one pronouncement, then the divorce would be revocable.

The other tradition, which is invoked by the upholders of the above-mentioned view, is the one narrated by Ibn 'Abbās. The text of this tradition is as follows:

'Ṭa'ūs relates on the authority of Ibn 'Abbās that during the time of the Holy Prophet, the caliphate of Abū Bakr and the first two years of the caliphate of 'Umar, three pronouncements at one sitting were taken as one pronouncement only. Thereafter 'Umar decided that "when people have begun to be hasty and careless in a matter that calls for great care and caution, why should we not enforce such *Ṭalāqs*?" ' (Related by Muslim).

If the above tradition is alleged to mean that up to the early days of 'Umar's caliphate three pronouncements, irrespective of the occasion and nature, were deemed as one single pronouncement, then it conflicts with the other traditions which go to establish that such a *Ṭalāq* was held to be irrevocable. The fact, however, is that this tradition is not so general in character. The version of it quoted by Abū Dawūd clearly mentions that this was so only for marriages which had not been consummated. There are other scholars who hold that this is true only when the pronouncement has not been made with explicit reference of numbers but merely by repetition of the sentence 'I divorce thee.' In case the number is specified, there is no question of revocation to such a divorce. Whichever of the two meanings is accepted, this tradition comes in conformity with the other traditions and no conflict remains.

Another important point that deserves careful consideration is that Ibn 'Abbās, who is the narrator of this tradition, himself held the view that three pronouncements at one sitting constitute an irrevocable divorce. Now the question is: Why is it so and how is it possible that a companion and *faqīh* of the rank of Ibn 'Abbās, on the one hand, narrates that three pronouncements in the days of the Holy Prophet and of Abū Bakr were regarded as one pronouncement only and, on the other hand, he himself gives the verdict that three pronouncements do constitute a *decisive Ṭalāq*? The explanation is that the said tradition does not lay a general rule and is not about all kinds of *Ṭalāq* but refers to *Ṭalāqs* in cases of unconsummated marriages or to divorces where the word *Ṭalāq* is repeated thrice. No other construction can be put upon this tradition.

As to the views of Ibn 'Abbās on this problem, let us refer to some of the traditions which throw light on it.

'It is related by Mujāhid that he was with Ibn 'Abbās when a man came to him and said that he had made three pronouncements of *Ṭalāq* to his wife. Ibn 'Abbās remained quiet for a few moments and, because of his silence, Mujāhid thought that he would declare such *Ṭalāq* as revocable. But Ibn 'Abbās said: "People commit wrongs and follies and then come to Ibn 'Abbās to help them out of their difficulty. Allah has said that He helps those who fear Him. And as you have not been afraid of Him and have invoked His wrath and anger (by following a wrong method), I cannot help you. Your wife stands divorced."'

'Mujāhid relates that somebody asked Ibn 'Abbās his *fatwa* about the divorce which he had given to his wife. He had divorced her one hundred times at one sitting. Ibn 'Abbās said: "You have disobeyed the injunctions of God and are now deprived of your wife. Had you been afraid of God (and followed His commands), He would have made matters easy for you."'

'Sa'īd bin Jubair narrates that somebody had given his wife one thousand divorces and when he asked the *fatwa* of 'Ibn 'Abbās he said: "Three divorces were sufficient to separate you from your wife. The responsibility for the remaining 997 rests upon your shoulders."'

In another tradition, Sa'īd bin Jubair narrates that somebody said to his wife: 'I give you as many divorces as there are stars in the heavens.' Commenting on this divorce, Ibn 'Abbās said: *'He has disobeyed the* Sunnah *and his wife is separated from him.'* (Dārqutnī).

A thoughtful study of all these traditions establishes the point we have discussed above. If all the *Aḥādīth* are considered, and not merely any one set of them, and they are studied with the object of reconciling them, then no other conclusion would be justified.

This, in our view, is the real position. Now, if the recommendation of the Commission is given legal effect, it would not only be against Islamic law, but would also make divorce a plaything. Anybody may pronounce thousands of divorces on the wife and then say that he never meant that. This would be an open sport with God's injunctions and that is why 'Umar closed the doors of this revolting game which would rob the words *Nikāḥ* and *Ṭalāq* of all their significance.

We hold that the best possible course is that the view of the

overwhelming majority of the legists should be respected and the folly of flouting it avoided. Such *Ṭalāqs* should be regarded irrevocable and the person who divorces in this way punished or fined so that this play with the Book of God should end for ever. According to a tradition related by 'Abdur Razzāq, a man who had given his wife one thousand divorces appeared before 'Umar. 'Umar asked: 'Did you really mean to divorce?' He replied, 'No, I did it only in jest.' On hearing this reply 'Umar punished him with whips, held the divorce irrevocable and said that for purposes of separation only three divorces would have been sufficient.

Another proposition may be that the question be left to be decided according to the views of the sect the parties belong to. It would be quite in consonance with our Constitution which guarantees the protection of the personal law of each and every sect. Where husband and wife both belong to the same sect, no complication would arise. In cases where they belong to different sects, the religion of the husband should prevail.

Registration of divorces

The Commission have also suggested the registration of divorces in the same way as they have suggested the registration of marriages. They have made two suggestions. One is that of a standard *Ṭalāq-nāmā* to be made in triplicate, giving specific details as to how the *Ṭalāq* had been effected. One copy of the deed of divorce should be sent to the Tehsildar for registration in the official register of divorces. If the deed of divorce is not completed, the husband would be liable to a fine not exceeding Rs. 500.

However, some members of the Commission are not sure whether this would fully safeguard the rights of women. Therefore the Commission suggest another method of divorce. They say, 'It should be enacted that no one can divorce his wife without recourse to a Matrimonial and Family Laws Court. When a court is approached, it should not permit the person to pronounce divorce until he has paid the entire dower and made suitable provision for the maintenance of his first wife and her children.'[1]

My objections to the first suggestion are the same as I have mentioned in respect of the registration of marriages. If this form

1. *The Report*, p. 1214.

of registration is adopted, the Tehsildar's register would become a jumble of faked and fraudulent divorces and the purpose for which this device is being adopted would be miserably defeated. Rather the situation would be further aggravated amd litigation would also multiply heavily. I, therefore, deem this suggestion not only superficial, but also dangerous. As far as the second suggestion is concerned, I would like to make the following observations.

(1) The Commission have acted on the supposition that man is essentially and invariably the irresponsible evil-doer. He is the real criminal. He pronounces *Ṭalāq* just out of nothing. He throws the wife and the children to the winds, leaves them totally unprotected and uncared for, behaves most irresponsibly, brings in a new wife, etc., etc. But this is only a one-sided view. If the Commission think that all cases of divorce arise out of such situations —or even that most of them so crop up—then I am constrained to say that this assessment is most unrealistic and incorrect. Only arm-chair theorists can utter such things—things which have no relevance to actual facts of life. The cases of divorce in our society arise out of a legion of causes. Often the husband is compelled to divorce because of the untoward behaviour or the quarrelsome nature of the wife or because of some serious lapse or immorality. At least amongst the middle and poorer classes this, generally, is the situation. The Commission's assessment may be true in the case of the upper and the rich, ultra-modern classes, but the average citizen never behaves in that way. He is never so enamoured of bringing in a second wife. He cannot just afford this 'luxury.' He has to look to a number of factors, and then alone can he think of separation.

In case of divorce, the payment of the dower is a religious responsibility. The question of maintenance of the children is also justified and reasonable. But how can the court ask the man to pay for the maintenance of a woman who is no longer his wife? The *Sharī'ah* makes it the responsibility of man to pay for the maintenance of the divorced wife during her *'iddat* or if she is pregnant until delivery or in case she has a child to nourish up to the period of *raḍā'at*. One cannot be made responsible for the maintenance of a woman beyond these specified periods. Neither the *Sharī'ah* nor human reason can justify such an unreasonable

and irresponsible extension of responsibility. The fact is that among the poorer classes an important cause of divorce is economic stringency. When the needs of the wife are not properly fulfilled, family feuds ensue and often culminate in unfortunate divorces. In such cases how would it be reasonable to make the man responsible for the maintenance of the wife as well? Had he been able to meet the needs of the wife, why would it have led to divorce? And if he could not maintain her as a wife, how can he guarantee that he would be able to meet the expenses of her maintenance after separation? Now, if the court disallows him to pronounce divorce, how would this verdict of the court remove their economic difficulties? How would it eliminate the causes of tension? How would it make their relationship cordial? In case the reply to these questions is in the negative, would not such verdict of the court make life more miserable for the poor wife? Of what use is such an interference of the court? It would only make matters more confused.

(2) The *Sharī'ah* has conferred upon man the right to divorce. By what canon of law can this right be snatched away from him and bestowed upon the court? Can it be justified by any notion of law and justice? If it is said that the court can use this right more cautiously and more carefully, the question arises: If the husband is not willing to live with the woman what can the court do in this respect? At best the court can refuse to give him permission to pronounce the divorce. But what would it lead to? What good can come out of a forced get-together of an unwilling pair? Would it not make life more miserable, nay intolerable, for the poor woman? The court cannot inspire love between the spouses. It cannot 'enforce' a *happy* family life.

Anyway, should the question of *mehr* assume the form of a dispute, why should it be brought to the court even before it develops into a dispute? *Mehr* is a religious responsibility and through proper education its payment can be normalised. There will be only very few cases of *Ṭalāq* in which it assumes the shape of a dispute. Then how would it be reasonable to drag it to the court even if there is nothing wrong about it? In case some dispute does arise it can easily be settled through the matrimonial and family laws courts and there would be no fear of any injustice to the woman.

(3) The reasons for which a person is compelled to divorce his wife are often such as can be only felt by the person concerned *but cannot be described.* In such a case, if the court sits to decide the admissibility of the reasons, the person concerned might feel compelled to make such allegations against the woman as may look 'forceful' to the court. Such allegations would mostly be of a moral nature, as is amply evident from the example of the modern West. The actual reasons are concealed in most of the cases and in their place such allegations are concocted and put forth as would be acceptable to the court. This would expose our women-folk to the worst form of exploitation and mental torture. It may be possible for a woman in the West to remain honourable in the eyes of society even after the shower of such moral charges, but in our society it would spell disaster to the entire life of a woman if such a calamity befalls her. And this would not only ruin the lives of the women concerned, but would also adversely affect the moral atmosphere of the entire society. This is the worst form of danger which the recommendations of the Report unleash for our society.

Maulana Ehtishamul Haq is said to have told the Commission that these proposals will become permissible in *Sharī'ah* if a condition to the effect that the husband gives up the right of pronouncing *Ṭalāq*, except in a matrimonial and family laws court, is inserted in the standard *Nikāḥ-nāmā*. As his note of dissent is not before me, I cannot say what actually Maulana Ehtishamul Haq means, but I regard this suggestion as out-and-out abhorring to the Islamic *Sharī'ah* and have stated my views quite in detail in the foregoing discussions over the transfer of the divorce right. Here I would like to ask only one thing: Would every person be legally bound by this condition or would it be optional? If it is to be optional, I would like to know how many people would accept it? Should it be made compulsory, it would be procuring the acceptance under duress which the *Sharī'ah* can never allow. No such condition can be forcibly thrust into the *Nikāḥ-nāmā* which is not an outcome of the free choice of the spouses. No *tafwīḍ* or *tawkīl* which has even an iota of duress and compulsion is admissible in the *Sharī'ah*.

The fact is that the suggested interference of the courts in the matter of *Nikāh* and *Talāq* is against the very nature of these

cases. Matrimony depends upon the mutual confidence and mutual love of the spouses. The court can decide disputes but how can it take upon itself to generate and establish mutual love and confidence? Let the courts interfere when any dispute arises, or when any injustice is done. Otherwise, if everything is to be regulated by law and the law-courts, the calm, poise and tranquillity of life would be destroyed and disputes would arise even from those quarters where there is no cause for such occurrence.

Maintenance of the divorced wife

The Commission have suggested that the matrimonial court should have the power to make the husband pay maintenance to the divorced wife for life or till her re-marriage, if the wife is divorced without any adequate reason.

The Commission have not felt it necessary to substantiate the advisability of this proposal or to advance any argument, howsoever weak, from the *Sharī'ah*. Under Islamic law, the husband is responsible for maintenance only during *'iddat* or, if the woman is pregnant until the delivery or up to the period of *raḍā'at*. This cannot be extended to an indefinite period. Neither the *Sharī'ah* nor commonsense can sanction such an extension. Perhaps this suggestion has been given out of sympathy for the weaker sex. If so, this is a good idea, but the responsibility for her maintenance should be upon the state and not upon the poor man who has divorced the wife.

If the suggestion is given legal effect, it would be injurious to the interests of the women-folk in a multiple of ways. When such cases of divorce would come up before the court, the husband would like to make the reasons for divorce as forceful as he can. As such so many unscrupulous things might be said and the brunt of them would be borne by the poor woman—for she would be the weaker of the two.

Furthermore, in our society it is an unfortunate practice that the divorced woman is not looked upon with respect and veneration and her position is not as strong and fair as it should have been. In such a society, when the reasons, good or bad, behind the divorce come up before and are accepted by the court how miserable would the position of such a woman be? Ordinarily, she may avail of the benefit of doubt, but after the adjudication of the court, she would be nowhere. How would she be able to live

an honourable and respectable life in such a situation? It would virtually mean throwing the poor woman into the whirlpool of hardships and ignominies.

The effects of this law on the moral climate of society would also be adverse and shattering. Every case of divorce would bring in its wake a legion of fictitious stories and only heavens know what dirty linen would be washed in the courts. These stories would appear in the press and would spread the evil in every nook and corner of the country.

Such are the dangers embedded in this suggestion. One wonders whether this is sympathy towards women and an attempt to protect their rights, or an unwise suggestion to expose them to public ignominy and social hardships.

Polygamy

The Commission's recommendations in respect of polygamy are that nobody should be allowed to take a second wife without the permission of the court. The court should grant the permission only if it is satisfied in respect of the following three points:

(1) There exists a sound reason for a second marriage. 'He should satisfy the court that the first wife is insane, or is suffering from some incurable disease or that there are other exceptional circumstances which make his second marriage an inescapable necessity and that he is not taking a second wife merely because he wishes to marry a prettier or younger woman than his first wife.'

(2) That he is 'capable financially to support two families, satisfying their basic needs of life and guaranteeing the standard of living to which his first wife and her children have been accustomed.'

(3) 'The court shall ascertain the wishes of the first wife also, and if she insists on living separately from her husband and the second wife, the court shall not pass any order permitting the second marriage unless adequate arrangements are made by her husband for suitable separate accommodation and other amenities for the first wife.'[1]

In support of this view the Commission argue that:

'There is only one verse in the Holy *Qur'ān* which deals with

1. *The Report*, p. 1216.

the question of polygamy. This verse was revealed to solve certain difficulties which had arisen in the matter of orphan-girls and widows. The permission to marry more than one wife originated for the establishment of social justice . . . . the Holy *Qur'ān*, as a matter of emergency, permitted Muslims to marry more than one woman. . . . Experience has confirmed that many Muslims indulge in polygamy, disregarding the original reason of the permission, and waiving aside the condition of doing equal justice between the two wives. The abuse of this conditional permission makes it necessary for the State to see that polygamy is not practised except in cases where it could rationally be justified, as justice is a condition precedent for this permission.'

The Commission further opine that 'prevention is better than cure' and therefore restrictions should be placed upon second marriage.

The Commission's view that the said verse of *Sūra al-Nisā* was revealed only to meet a certain emergency and is related merely to the protection of the rights of orphans is simply incorrect. The fact is that the said verse does not grant any new permission; the permission was there and it was under that very permission that the Holy Prophet and his companions had more than one wife. This verse did not grant any new permission. It only suggested the use of this permitted device to meet a situation that had engulfed the Muslim society. Moreover, on that occasion some restrictions were imposed on this permission, which the Muslims immediately began to translate into action.

Thus it is absurd to say that the permission to marry up to four wives was granted by this verse, or that it was granted merely to protect the rights of the orphans and the widows. What can be justifiably said is that through this verse Muslims were asked to avail of a permission, that already existed, for the solution of a social problem. They were enjoined to marry the widows and thus protect them and their children from the vagaries of unprotected life.

The Islamic permission for polygamy is not based merely on the plea that it is essential to protect the rights of the orphans—although this is an important ground for permisssion. It has been granted to cater to a multiple of social and personal needs. We

would like to refer to some of them in the following.

(1) At times it is essential, in the interests of Islam and the Islamic community, to have more than one wife. Most of the marriages of the Holy Prophet were effected for this very purpose. In none of these the question of the protection of orphans was involved. In *Sūra al-Aḥzāb* it is clearly stated that the *Ummahāt al-Mu'minīn* shouldered an enormous responsibility in respect of the dissemination of Islamic teachings. They were instructed by the Qur'ān 'to make their homes echo with the verses of the Qur'ān and the words of wisdom that are uttered therein.' The fact is that the *Ummah* has learnt a great deal about Islam through these very pious ladies who unveiled even their private lives to the *Ummah* so that the personal lives of the Muslims may be illumined with the example of the Prophet.

(2) Sometimes social and national exigencies call for polygamy. In *Sūra al-Visā* such a need has been emphatically stressed. When, due to war, the problem of widows and orphans cropped up, Allah pointed out the way to its solution in the form of polygamy. This was the most honourable and most dignified way of solving the problem. It was through this device that women were given a respectable position in society and were not left unprotected in the rough and tumble of life. To-day most of the western countries are faced with a similar problem. Two world wars have shattered their social life. The problem of surplus women has assumed menacing proportions. Young girls are hankering after men in a chase without prize. But the device of polygamy is not being adopted to solve this problem. The law of monogamy has chained down man and has arrested all efforts at a respectable solution of this problem. An idea of the plight of women in such a society can be had from the following despatch of the London correspondent of a Lahore daily:

'The two world wars have disturbed the proportion between men and women in England. Now women outnumber men and most of them grow old without achieving their heart's desire of marriage. Although they have every chance to "enjoy" life but they fail to attain the real peace and contentment of the soul. A London priest has rightly said that if somebody regards an unmarried woman as a married one, she bursts with joy.

'Most of the young girls have made only one pursuit as their life-objective: to search for a husband. In this search they leave

no stone unturned and even cherish the illusion of regarding every friend as their prospective husband.

'The said priest has also said that those of unmarried women who can get themselves called "Mrs." regard themselves as very respectable and honourable—nay very superior to others and look down upon others as spinsters. Whenever girls meet, the first thing which they try to look at is the marriage ring. In such conditions girls begin to love even the very idea of marriage.

'The priest has complained that as soon as a girl becomes of fifteen years she gets haunted with the idea of marriage. The fact is that the paucity of men has become a problem in England—rather throughout Europe. One of the major reasons of the moral laxities and evil monstrosities which one sees everywhere in the western civilization is the paucity of men. Woman's urge for marriage is incarnated in her nature. It is the very demand of her womanhood. But the intellectual stalwarts of the West hold that a man should not marry more than one wife, although he may have sexual relations with as many as he likes. The law and religion of the West is prepared to tolerate mistress-keeping and extra-matrimonial sexual relationship but they regard recorded marriage as something base, evil and uncivilised.'

The correspondent concludes:

'In this region of the world the woman is free beyond doubt, but her plight is unbearable. Woman, here, enjoys no respect or veneration. She holds no respectable position in the eyes of the people. She lives like a common creature and deserves sympathy. If the progressive and emancipated woman of the West gets a chance to see even a few glimpses of the life of woman in the East—the "so-called" jail-life of her—she would curse her freedom thousand and one times. In the West woman thirsts for home, family and children. She wants to live the family life, but cannot and dies without quenching this instinctive urge. She lives a frustrated life—a life full of diappointments, and I make bold to say she is becoming conscious of this bewildering plight of hers.'

This is the state of social life in the Occident. All moral codes are being broken. Sexual laxity has assumed baffling proportions. The concepts of virtue and chastity have been torn asunder. Man is aghast over the woman's chase. Woman is frustrated over this life of disappointment and ignominy. But the westernised intellectuals are prepared to tolerate everything—what they cannot tolerate is polygamy, the only solution of this problem.[1]

1. It would be instructive here to quote an extract from an essay of Mrs. Annie Besant, the leading theosophist, which throws lurid light on

[*Continued on next page*

Some people object to this argument and contend that if at any time, due to some calamity, men were to out-number women, would women be permitted to take more than one husband? If polygamy is permissible, why not polyandry in a situation where women are in paucity?

We regard this objection baseless because nature so regulates the births and deaths that no such significant disbalance arises. It is a law of nature that equilibrium exists between man and woman and births and deaths both have a uniform effect over the two sexes. The problem of surplus women arises because of wars or such calamities as consume men alone and not women. As women do not actively participate in war, the question of their paucity does not arise. Islam further enjoins upon its adherents to treat women and children as non-belligerents and thus protects them from indiscriminate slaughter. The question, therefore, is irrelevant and would not arise in an Islamic state. As far as other societies are concerned, even there such a situation cannot arise except on account of some unnatural behaviour. The evils of this system are, however, of such magnitude that even there it can be permitted.

Some people argue that if the excess of women has become a problem in the West, let them resort to polygamy. Why should we, it is asked, permit it in our society, when there are no surplus women as such? The reply to this objection is quite simple. If we do not have a large number of surplus women, we also do not have a large number of polygamous marriages. Even the Commission have had to admit that in our society it is not widely prevalent. If polygamy is not very significant in our society, why all

the problem. She writes: 'There is pretended monogamy in the West, but there is really polygamy without responsibility; the mistress is cast off when the man is weary of her, and sinks gradually to be the "woman of the street," for the first lover has no responsibility for her future and she is a hundred times worse off than the sheltered wife and mother in the polygamous home. When we see thousands of miserable women who crowd the streets of western towns during the night, we must surely feel that it does not lie within western mouth to reproach Islam for polygamy. It is better for woman, happier for woman, more respectable for woman, to live in polygamy, united to one man only, with the legitimate child in her arms, and sorrounded with respect, than to be reduced, cast out in the streets—perhaps with an illegitimate child outside the pale of law—unsheltered and uncared for, to become the victim of any passerby, night after night, rendered incapable of motherhood, despised of all.'—*Editor*.

this hue and cry against it? And if it is said that, although the cases of polygamy are few, the injustices which occur because of it do call for some drastic steps, then our submission is: fight against the injustices and set things right; why, after all, adopt a method that would open the doors to a thousand new evils? The present injustices are not the result of the institution of polygamy, but are an evil product of the present system of life and of our own negligence towards the problems of society and the teachings of Islam. Now, one fails to understand why, instead of correcting themselves, these people are bent upon 'correcting' Islam.

(3) In certain cases man has to marry another woman to fulfil the demands of his family or to keep another woman immune from false allegations. Supposing a man has in his home a widow relative who has some children. This person happens to be the guardian of those children and the woman lives with the children to look after them. She might have no other respectable place to live. Now, in such a situation, Islam welcomes marrying the widow. This is a service and a sacrifice and as a result of such marriage not only the position of the widow and her children is exalted, but the doors to so many other evils are also closed down. Such a marriage would, undoubtedly, be deemed as commendable by all moral reformers. The honourable members of the Commission, however, deem it a crime!

(4) At times one is compelled by the considerations of one's own moral health to marry a second wife. Suppose somebody's wife is weak, or is unable to bear the burden of many children, and the spouses do not believe in birth control nor is the husband prepared to stoop to the degradation of extra-matrimonial sexuality. What should he do? Again, supposing a man has fallen in love with another woman and he feels that if he does not marry her, he might get himself involved in some sinful behaviour. What should he do then? Or suppose a man is endowed with extraordinary sexual strength and he wants to abide by moral laws and regulations of Islam. Has he any way other than polygamy to satisfy his natural urge? In such situations the modern West permits a man to do whatever he likes and provides him with night clubs, brothels and other abodes of corruption for sexual outlets. Free love and life of promiscuity are the order of the day there.

Islam, however, strictly prohibits all these sex-excursions and jealously guards the moral climate of society. Islam, therefore, permits a man to marry more than one wife if he genuinely feels the necessity to do so and along with it enjoins upon him to establish justice between both the wives.

Here, again, some people may object that if polygamy can be permitted to satisfy the over-sexuality of a man, why not permit polyandry as well to meet a similar situation in respect of a woman.

This objection is a product of ignorance of the sciences of biology and genetics. A man can impregnate a number of women while a woman may go to as many men as she likes but she would conceive by one man only. It shows that polyandry militates against the very nature of mankind. By nature man can afford to be polygamous, but not so the woman.[1]

Moreover, if a man visits more than one woman there would be no confusion about the parentage of the child, but if a woman were to go to more than one man it can never be said by whom she has conceived. The *nasb* of the children would be thrown into confusion with the resultant shattering effect upon the very institution of family. Polygamy has no effect upon it, but polyandry would tear it to pieces. Islam is the religion of nature. It is not the product of the brain of some perverted intellectual. It is the religion of God—the creator of nature. As such, it gives full consideration to the needs of human nature and society and banishes all those malpractices which go to destroy them. That is why Islam does not permit polyandry and a reasonable person can never even think of it. Should a woman happen to have abnormal sex-hunger, she can seek *Khula'* and marry some other man and in this way satisfy her urge in a morally permissible way. The fact is that a woman who leads a family life, brings up children, looks after the home and its requirements and spends

1. The views of two leading authorities may be stated here for the benefit of the general reader:

Dr. Mercier says: 'Woman is by nature a monogamist; man has in him the elements of a "polygamist" (*Conduct and Its Disorders: Biologically Considered*, pp. 292-93). Edward Hartman says: 'The natural instinct of man is in favour of polygamy, and that of woman is in favour of monogamy' (Quoted, Roberts' *Social Laws of Quran*, p. 7).—*Editor.*

her time in good and virtuous pursuits can never have the feelings of any abnormal behaviour. In an Islamic society, woman does not live and breathe in the sex-ridden atmosphere that we find in the modern western society. She breathes in a moral climate, lives a homely life, cares for her children and adopts noble and virtuous pursuits. In such a society, her life remains normal and nothing extraordinary happens. So far as the problems which are the product of the corrupt society of to-day are concerned, of a society where sexual feelings are aroused at every turn and pass, where theatres, cinemas, night clubs and mixed gatherings evoke abnormal and unnatural feelings and where sexy literature spurs man and woman to act in obnoxious and perverted ways—Islam cannot and should not be held responsible. And the solutions to these problems lie not in hurling allegations against Islam but in trying to change such a monstrous society itself.

Thus we find that there are so many reasons behind the Islamic permission for polygamy and it is virtually impossible for any court of law to comprehend them or to pronounce judgment on their admissibility in any particular case. Only the person concerned and no one else can decide in regard to its advisability or otherwise in a given situation.

As to the contention that because people do not generally respect the conditions which Islam has imposed on polygamy, some new restrictions should be imposed by the Government or the permission itself be cancelled, our submission is that this solution of the problem is absolutely untenable and our reasons for this view are as follows.

First of all, it is unjustified to impose any restrictions over and above those which Islam has already imposed. The endeavour should be to fulfil conditions which Islam has laid in their letter and spirit and not to make a thing cumbersome and impracticable by overloading it with new and novel conditions. If the new conditions are being imposed because of the view that the Islamic injunctions cannot be abided without the imposition of these restrictions, then, I am sorry to say, it is an extremely perverse view of Islam. Islam is a complete way of life; it does not suffer from such weaknesses and only those who are ignorant of

Islam or who do not regard it as a *Dīn-e-Kāmil* (complete code of life) can make such assertions. The fact is that the imposition of such restrictions is the way of the Jews. It were the children of Israel who tampered with the religion of God by adding to it their own ideas and conditions and thus reducing the Book of God to a jumble of absurdities. It was the mission of the Holy Prophet to extricate mankind from that confusing web of superfluities. Now the Commission, on the one hand, shed tears over this attitude of the Jews and, on the other, themselves follow exactly in the footsteps of the Jews.

I would like to substantiate the point by reference to a few examples. Islam has permitted us to eat even a forbidden (*ḥarām*) article in the case of dire and inescapable necessity when we are left with no other choice. Yet Islam imposes the restriction also that the person using such a thing must not be doing so out of disobeyal and must not eat more than the barest essential. Everybody knows that there are so many people who do not respect these conditions. Now, would it be justifiable to enact a law making it essential for the person using such an article to produce a certificate from an official doctor or a magistrate that he is really faced with a dire and inescapable necessity and should be permitted to use it?

In certain cases, Islam permits man to perform *Tayammum* in place of *Wuḍū*. If certain people misuse this permission, would it be justifiable for the state to impose the restriction that unless one produces a certificate from the *Qāḍī* one cannot avail of this permission?

Islam permits the spouses to make any adjustment in the amount of *mehr* by mutual consent if they so desire. Everybody knows that there are cases where custom or other factors so influence the will of the spouses that it actually does not remain free. Would this situation warrant a law to make it incumbent that such adjustment can be effected only if the court gives a certificate that they are doing so out of their free will?

Secondly, we should give careful thought to the question: Why after all are people misusing this permission given by Islam? Is the permission in itself unjustified? Or are the conditions attached to it by Islam insufficient aud ineffective? Or are there

some other causes of the misuse? The Commission willy-nilly admit that the permission has its justifications. They also admit that the conditions are not insufficient. Their real complaint, however, is that the conditions are not fulfilled and that some people take wrong advantage of the permission and exploit the same. If this be the real problem, let us find out its causes. I think, it is mainly the result of the following two causes:

(*a*) Because of an all-pervading ignorance neither men are well versed in the injunctions of Islam nor do women know their rights and privileges—nor have they any conscious urge for the attainment and safeguard of their rights. There could be no question of the growth and development of this realisation during the dark age of foreign domination, for they had left everything to local customs and traditions. This lowered the position of our women and reduced them to the position which Hindu custom and society had given to them. No powerful movement for the proper protection of the rights of women, as enunciated by Islam, was started, and even after partition no healthy and promising movement in this respect is to be found in our country. Although women have now begun to receive their share in inheritance in most of the areas, on the whole there is yet no consciousness of the real rights of women. Not only no positive work is being done in this respect, but the All-Pakistan Women's Association (APWA), an organisation patronised by the Government, is doing great disservice to Islam and to the women-folk. This organisation is working for the avowed purpose of dragging women out of *purdah* and to make them blindly follow the life of western women and society. Moreover, its activities are mostly confined to women of some upper-class families. It instructs them as to how to parade and how to salute, but teaches them nothing about the rights and duties of womanhood. It would be no exaggeration to say that far from considering it worth while to study Islam and its injunctions and to strive for their implementation it thinks Islam itself as something which should be done away with. As such, what service could it render to the cause of the dissemination of Islamic teachings and the awakening of a consciousness of Islamic rights, privileges and duties.

(*b*) The second basic cause behind this situation is the

absence of proper and efficient judicial machinery for the protection of the rights of women. The system which was introduced by our erstwhile rulers is too cumbersome to provide justice to the common man. A poor woman cannot dare to seek justice through the existing machinery, and if one does, she can hardly achieve anything except loss of good name and waste of money. It is this unjust system which has reduced the rights of women to packs of dust. The laws of Islam functioned in a marvellous way when Islam held political sway over the Muslim lands. Despite open permission for polygamy, nobody dared to treat his wife unjustly for he knew that it would not be tolerated and that he would have to suffer for that both here and in the hereafter. In the Islamic society the weak were supported and protected. The tone and temper of this society is such that the weak, if they happen to be innocent victims to oppression, are the most strong in its eyes and the influential and the powerful ones, if they resort to injustice, are most ineffective and impotent. Any woman could approach the court and seek justice without harassment and without paying court-fees and stamp duties. She could even approach the highest of the state officers and get her rights through them. If this order is established in the country and if proper consciousness of their rights is cultivated amongst women, who can dare to abuse this permission of Islam and behave unjustly?

The Commission have also tried to derive support from the maxim that prevention is better than cure. What the Commission mean is that instead of devising ways and means to check the injustices that might arise out of polygamy it is better to put such restrictions as would eliminate the possibilities of polygamy so that the need of such devices would never arise. A good point indeed! But the Commission have forgotten that the permission for polygamy is in itself a preventive measure against a host of social and moral ills. If this preventive measure is abolished, a legion of social and moral epidemics would break loose and throw society into convulsion. All those ills that are being checked by means of polygamy would in that case get a new and invigorated lease of life and corrupt our entire social structure. Have the Commission given due thought to this aspect of the problem?

This was a brief review of the Commission's arguments in favour of their recommendation. Now, I would like to refer briefly to the dangerous consequences that are bound to flow if this recommendation is accepted.

(1) When it would become impossible for the people to marry a second wife without proving in a court that the first wife is insane or is suffering from frigidity or some incurable disease, they would naturally be led to see their way to divorce her and thus get the chance to marry a second wife. Thus, in the teeth of all the obstructions pitched by the Commission, they would try to divorce such a woman and to all likelihood in most cases they would succeed—although they might have to resort to the ignoble device of hurling false allegations at a noble lady. What would be the result of all this? Women living a respectable life in their homes would be driven out as divorced wives with certificates of ignominy, bearing the authority of an honourable court. How many people would be prepared to marry such women? Would this provision not worsen the plight of the women?

(2) If a man wants to marry a second wife and the court, deeming the reasons as insufficient, refuses to grant him permission, he will definitely be stopped from marrying a second wife, but this would automatically reduce in his eyes the position of the wife. For, he would begin to regard her as the real cause of his failure and frustration. One can easily imagine the psychological condition of such a person. He would deem his wife as a curse and, instead of loving her, he would begin to hate and look down upon her. He would deem her responsible for the frustration of his genuine desires. He might not be able to divorce her because of so many family considerations and the poor woman would come to know rather too late that the husband's love is not to be had through the agency of the court. In the case of the second marriage, the possibility of justice and good behaviour was there, but in this case, the man would regard her as an obstacle in his way, whose removal he would always cherish. How bitter this consequence for the poor woman whose emancipation these people claim to have as their objective!

(3) If the person concerned is not a scrupulous follower of the *Sharī'ah*,—and unfortunately the number of such people is

quite significant now—he would seek illegal means for the satisfaction of his desires. He would have extra-matrimonial relationships and although legally he would be or appear to be monogamous, actually he would be living a polygamous or even promiscuous life. In this way he will drift to a life of immorality and sinful indulgences which will spoil his faith and character and his life in this world and in the hereafter. He would become careless towards his wife, children, home and family, and would fritter away his time, energy and wealth in ignoble, un-Islamic and anti-social pursuits. Although legally there would be no 'second wife,' many illegal 'wives' would so overwhelm him that the real wife would receive nothing but neglect, and in that situation nobody would come to the rescue of the wretched woman—neither would such a wife be able to get any fixed portion of the income of the husband. She would be thrown into an unbearable agony.

(4) The effect of the immoral and licentious life of such persons would be very disastrous for society. The entire climate of society would be vitiated. The worst would happen to the institution of family. When the husband neglects the wife and lives a life of no scruples, the woman too would be gradually drawn into the orbit of undignified life. In the beginning there might be some scruples but within no time the activities of such women could take so drastic and speedy a turn as to outdo the husbands. And the moral life of the children can easily be imagined in a family where neither the husband is true to the wife nor is the wife true to the husband. The institution of family would begin to totter and the new generations would be brought up in a tradition of infidelity and corruption and all the evils of the western social order would come upon us and so overwhelm our society that we might be left with no means to wriggle out of this monstrosity.

(5) This law would in no way be effective in curbing the evils of polygamy—if it is an evil at all. It would indeed be very much instrumental in securing for a number of women verdicts of insanity, imbecility or incurability. This will happen because polygamy has virtually no existence amongst the poorer classes. It is only the well-to-do people and those of the upper classes who resort to polygamy. For them it would not be difficult at all to fulfil the conditions imposed by the court. They would surely

be able to convince the court that financially they can very well support two wives and through methods fair and foul they can easily secure a certificate from any hospital or recognised doctor that the first wife is insane or suffers from some incurable disease. It is an open secret that such things are being secured even to-day, but the cases are few because the 'need' for such certificates is not so very widespread. When this new law is enacted and when the 'need' of such certificates grows, everyone can imagine the situation likely to develop. These are not imaginary fears but very real dangers which, if not realised to-day, are destined to shatter our society beyond repair.

Mehr

The Commission's recommendation in respect of *mehr* is that 'it should . . . be enacted that a husband will have to pay the *Mehr* fixed in the marriage contract however high it may be.' The Commission want this in order to break up the 'vicious custom' of 'fixing an inordinately high sum as *Mehr* without any intention of paying it.'

From the legal wiewpoint there is nothing wrong with this recommendation. But as the Commission have again and again appealed to reason and justice, one should expect them to behave in that light in respect of this problem. However, due to their brilliant one-sidedness they have ignored how unreasonable and unjust this recommendation would prove for the husband.

Everybody knows that simple and ordinary *mehr* is the real demand of the spirit of Islam. It disapproves of high *mehr* fixed for considerations of prestige and status. It is unfortunate indeed that a 'vicious custom' has developed and taken its roots in our society. Most often this insistence on inordinately high *mehr* is from the side of the bride. What generally happens is that when the *barāt* (marriage-party) reaches the bride's place and everything is ready, the guardians of the girl ask for a higher *mehr* and the bride-groom cannot but concede to the demand.

This is the situation which we face. The Commission should have devised some solution that would fulfil all the demands of justice and would neither be prejudicial to the interests of the bride, nor to those of the bride-groom. If there are happy relations between the spouses, the question can be easily settled by them

and between themselves. In case, however, a dispute develops and it comes up before the court, the court should be required to look even behind the letters of the marriage deed and try its level best to administer justice. How would it be just or fair to make the husband pay a *mehr* which has no relevance to his actual status and position and which he cannot pay even after a whole life's labour.

As I have said, the insistence on high *mehr* is invariably from the bride's side. Suggestions should have been given to discourage this evil custom. Instead of doing this, the Commission have suggested the legislation of this custom and its enforcement through law-courts. How can the evil be eliminated in this way? Nay, if this recommendation is accepted, the danger is that marriage would become still more difficult and a time may come when common men would hardly dare to marry.

Custody

At present the mother is entitled to the custody of the person of her minor children up to a certain age, i.e. for a boy the age is seven years and for a girl till she attains puberty. In the opinion of the Commission, it is advisable to propose changes in this behalf because the Holy Qur'ān and the *Sunnah* have not fixed any age-limit and the law of age-limit is based merely on the *Ijtihād* of the legists. I am sorry to say that here again the one-sided approach of the Commission has blinded them to many aspects of the problem and the result is that their recommendation is out of harmony with the real spirit of Islam.

It is correct that there is no explicit injunction of the Qur'ān or the *Sunnah* which prescribes the age-limit. But that does not mean that the legists had fixed the limit just out of fancy and had no sound reasons for this deduction. They have arrived at this opinion in the light of a number of judgments of the Holy Prophet and their deduction is well grounded. It cannot be dismissed as sheer nothing.

A careful study of the verdicts of the Holy Prophet in cases that were brought to him reveals that a very basic consideration has been the well-being and welfare, education and training, and the protection of the interests of the children. If it could be achieved better by leaving the children into the custody of the

mother, this was done, and when the case was otherwise, they were given into the custody of the father. It is natural that these objectives can be better achieved when the children are with the mother; therefore, the *Sharī'ah* has preferred it. Should the mother be of an irresponsible temperament, or corrupt, or anti-Islamic or a non-Muslim, it is against the dictates of reason and of the *Sharī'ah* to give them to her custody. What can justifiably be demanded is that there should be no restriction on her meeting the children. To compel the father to give them to the mother's custody would be totally unjustified, for how can he, in fairness, be made to suffer his children being spoiled under the bad influence of the mother. The learned author of *Nailul-Autar*, after discussing all the relevant *Aḥādith* and the views of the various schools of thought, makes the following marvellous and illuminating observations:

'It is essential to look to the interests of the children before they are given the option to choose one between the parents for their custody, or before it is decided through *qura'*. If it becomes clear in regard to any one of them that he or she would be more beneficial and serviceable to the children from the viewpoint of their education and training there is no need of (deciding the issue through) *qura'* or of the choice of the children (but they should be given into his or her custody). This aspect of the problem is more important and claims priority over all others. This is the view which has been upheld by 'Allāma Ibn Qayyim who has quoted, in support thereof, the following and other similar verses of the Holy Qur'ān and the *Sunnah*: "O ye who believe, save thy wife and *children* from the fire of Hell." He holds the view that those of the legists who have suggested that the decision should be made by *qura'* or according to the children's choice, have conditioned this with the above consideration. He quotes Imam Ibn Taimīyya as saying: "Once a case about the custody of a child came up before the court and the court gave the child the option to choose the custodian. He chose the father. Thereupon the mother asked the court to enquire why he has preferred the father. On the court's enquiry the child said: 'Mother compels me to go to the school where the teacher punishes me every day while father allows me to play with the children and do whatever I like.' On hearing this the court gave the child to the custody of the mother." '[1]

I wonder why the Commission have ignored this obviously

1. *Nailul-Autar*, Vol. VI, pp. 351-354.

just and reasonable view.

Conditional Ḥiba *to wife*

The Commission have suggested that legislation may be enacted for providing that a childless Muslim may transfer his property to his wife with a proviso that after her death the property shall revert to him, if he is alive, and to his heirs if he has pre-deceased the widow.

Although, according to Mālikī school of thought, a life-long *ḥibā* is permissible and on the face of it nothing seems to be wrong about it insofar as everybody has a right to sell, mortgage or gift his property during his life-time, yet as far as the question of the legal inheritors of a person is concerned, I consider any preference or discrimination affecting the general provisions of the Islamic *Sharī'ah* as absolutely unwarranted. My arguments in support of the view are as follows.

(1) A basic principle of the Qur'ānic scheme of inheritance is that nobody is given preference in lieu of anybody's personal likes or dislikes. The share of each is fixed by God Who alone knows what would be best for him. We may give a greater share to someone but we know nothing what he will do with it after us. So the best way is not to disturb the divine scheme of shares—for there is no personal responsibility in it. This has been pointed out in the Holy Qur'ān in the following verse: 'You do not know who of them would prove more beneficial to you.'

(2) Another principle enunciated by the Holy Qur'ān is that nothing should be done that affects adversely the rights of any rightful heir. The Qur'ān says, 'After fulfilling the demands of the *waṣīyyat* and after paying the loans without inflicting *injuries upon* . . . .' The proposed *ḥiba* is bound to inflict injuries upon the rights of the rightful heirs and as such would be against the above-mentioned Qur'ānic injunction.

(3) Such preferential treatments engender enmity and hatred in the hearts of the affected parties and breed family discord. These discords often assume very menacing proportions and culminate into litigations, fights and struggles and even assassinations. How can Islam sanction a provision fraught with so much of discord and mischief?

(4) From the economic viewpoint too, this suggestion is wrong

and wasteful. If a thing is in the temporary custody of any person, it won't evoke proper and continued care and interest. As a result of this neglect and lack of interest, it would dwindle and deteriorate. Sometimes the deterioration is such that by the time it reaches the rightful heirs it appears to have lost all its value. Islam cannot tolerate this waste of wealth, because it has instructed very clearly that property should be protected from every kind of waste and injury.

As the proposed *ḥiba* suffers from all these defects, I disapprove of it vehemently.

Inheritance rights for the children of a pre-deceased son

The concern of the Commission for the children of a predeceased son or daughter deserves all sympathy and appreciation and we strongly hold the view that effective steps must be taken to improve their lot and provide for their proper help, succour and uplift. The suggestion the Commission have given will, it is feared, radically disturb the entire scheme of the Islamic law of inheritance and will turn it topsy-turvy. It seems that the Commission think that the only cause of the sad plight of the orphans is that they are not getting their share in inheritance and that everything would be set right if this is secured for them. This is a sheer illusion and the sooner it is dispelled the better. I fail to understand why the Commission do not think out other ways and means of helping the orphans and why they insist on a provision which destroys the entire system of Islamic inheritance. There are thousand and one ways to provide assistance to orphans and widows and a progressive society can devise innumerable dignified ways to do so provided the Government so desires. The Commission ignore them all and discuss the problem in such a strain as if all difficulties would be solved if they just receive a share from the property of their grandfathers.

I am not making detailed observations upon the problem because a thoughtful essay on *The Problem of Inheritance for the Children of a Pre-deceased Son* has already been published. In my view, the arguments presented in this pamphlet in defence of the view of Muslim legists are so strong and so convincing that no reasonable person can afford to disregard them. In the presence of this booklet, I do not see the utility of writing anything

else on the topic.

Now, I conclude my criticism of the recommendations of the Commission. I have confined myself to those recommendations only which are comparatively more important and have left the remaining ones, to some of which being just and proper I subscribe. There are still others with which I do not fully agree but I do not regard them to be so very harmful. In the next section I shall try to give some positive suggestions to solve the social problems with which our society is confronted.

6. SOME SUGGESTIONS FOR SOCIAL REFORM

I HAVE offered detailed criticism in regard to the recommendations of the Commission which are of a wrong and harmful type, but have purposely refrained from commenting on others which are mainly of two types. Some are definitely valuable and others, if not valuable, are at least innocent and harmless. *The proposal for matrimonial courts is the most important recommendation of the Commission and I endorse it with all the force at my command.* If this single suggestion is properly translated into practice it will go a long way towards solving many a problem and cutting asunder many an evil knot. Although the machinery suggested by the Commission has some loopholes which I had a mind to point out, yet I have refrained from doing so because I think that the weaknesses and drawbacks would automatically disappear with the gradual functioning of these courts.

Now, I would like to offer a few suggestions and would like to address them separately to (1) the *'Ulama*, (2) those in authority and (3) leaders of the feminine movement of this country.

TO THE 'ULAMA

THE future of Islam in this land depends to a great extent on the solidarity, tolerance and broad-mindedness of the *'Ulama*. Although the anti-Islamic forces have joined hands and have captured the entire machinery of moulding and influencing public opinion, yet there are promising signs that the masses and the intelligentsia are all desirous of Islam and would side with the Islam-loving forces if the 'Ulama strive hard and keep unity in

their raks. Our intelligentsia bitterly abhors the factional broils, sectarian rivarlies and hair-splitting quibblings which have become the order of the day particularly among the *'Ulama*. I am afraid, if something concrete is not done to set at rest the dust of controversy and quarrel, it would create a very bad effect upon educated classes and a considerable number of them would get very much confused about Islam itself. The vast majority of our people are fully attached to this ideology, despite alien education and not very glorious record of a section of the religious elements. The evil is still restricted to a very limited circle. Further spread of this disease can be checked, provided it is not nurtured by the recurring follies of the *'Ulama* themselves. Expediency and prudence demand that, instead of flaring up sectarian feelings, our *'Ulama* should concentrate on infusing the spirit of Islam into the masses. In a situation when a certain section is busy driving out Islam from our political and cultural arena, how callous and unfortunate it is that the *'Ulama* should become a party to mutual wranglings and indulge in trivial nothings. Some of the issues that are being controverted are of so insignificant value that, for their sake, dissensions and broils culminating into feuds and fights can never be deemed prudential. If someone attaches greater importance to such issues, the best course for him would be to adopt the method of academic and scientific exposition. Ways and means of ascertaining truth vary from age to age. This is the age of academic approach, scientific argumentation and critical assessment of things and through this media alone can people be convinced of the truth of an idea. The days of lingual duels and wranglings are over. They have no appeal to the modern mind. Such methods are rightly abhorred in the present age and the *'Ulama* must keep this in view, otherwise they won't be able to break much ice and their mutual wranglings would breed a general dissatisfaction against their ways, even against Islam. The fact is that adoption of the Constitution on Islamic patterns has rooted Islam very deep into the soil of Pakistan. Now, the opponents cannot muster enough courage to try to uproot it. The new strategy on which the adversaries of Islam pin down all their hopes is to accentuate petty differences, so that in the confusion created by

factional feuds and clashes the question of enforcement of Islamic laws could be thrown into oblivion.

At this juncture our *'Ulama* are faced with a trying situation and under an acid test. The enforcement of the Islamic law depends to a great extent on the prudence and sincere strivings of the *'Ulama*. It is time they concentrated upon the vital religious matters, setting aside all group prejudices and narrow factionalisms. One may, in one's individual capacity, follow whatever school one prefers, but in order to give the country a highly standardised law it is necessary that we should consult all the schools of Islamic jurisprudence with an open mind. As a matter of fact, we should be proud of owning this magnificent juristic record of four great schools of thought. These are our common heritage—and a glorious heritage indeed! They are the outcome of deep thought and the labour of those sages of our history whom we acclaim as our teachers and guides. They deserve equal respect and reverence. The depth of their knowledge and their godliness has made them shining towers of light and guidance. We take pride *in all of them* without any discrimination or prejudice and thank God that He, out of His bounty, gave the *Millat* such lofty juris-consults whose works will survive as towering monuments for all times to come. Needless to say that we do not hold anyone of them infallible or above criticism. We have been taught by these sages and guides themselves that we should not unthinkingly tag ourselves with anyone of them; rather we should hold fast to the Qur'ān and the *Sunnah* as our religion so demands. They have asked us to judge and evaluate their views on the touchstone of the Qur'ān and the *Sunnah* and to adopt those alone that are in conformity with these two basic sources. An error committed by a scholar in his endeavour for ascertaining the truth is preferable to a virtuous act performed out of ignorance or blind following.

We are, in this country, confronted with a group whose entire mentality has been poisoned by the present educational system and unfortunately it is these very people who happen to have got the political leadership of this country. They are habitual triflers and makers of fussy remarks about everything religious. They are labouring hard to impress upon the new generations that

Islamic laws are inferior to man-made laws. It is not possible to meet their challenge successfully unless we are clear about two things. First that it is Islam, and its juristic system as a whole, which is to be adopted and not this or that particular *Fiqh*. Verily, the Islamic jurisprudence as a whole is so immensely valuable that its superiority to the entire secular law can be established and vindicated. But if a fanatic insistence is made for the enforcement of some particular *Fiqh*, then the task of the adoption of the Islamic laws would be hampered and the entire country would be deprived of the blessings of Islam. Therefore, a broad-minded approach is the greatest need of the day. Secondly, mere citation of authority or authoritative books on jurisprudence will not appeal to the modern mind. In order to convince them and satisfy them fully, we will have to vindicate rationally the superiority and reasonability of Islamic laws on the one hand, and on the other, to show how they are based on the Qur'ān and the *Sunnah*. This is the proper way for the *'Ulama* to discharge their onerous duty in the present circumstances.

People cannot be convinced of the superiority of Islamic laws unless we follow the lines suggested above. It should be borne in mind that unfortunately our task is not to convince the believers but to initiate conviction into those who have become sceptics and have lost faith in their own ideology. It is clear that to achieve this the lovers of Islam should not come into the field as upholders of divergent schools of thought, and divided amongst themselves. They should step ahead as a team having common aims but different responsibilities. It is never suggested that you should forget once for ever your identical and individual views. If you at all wish to hold them fast, do so, but keep them as your personal views. In matters relating to constitutional, social and national affairs, we should make the Qur'ān and the *Sunnah* as the final arbiter and not this or that *Fiqh*. Instead of laying stress on the viewpoint of one's own particular *Fiqh* we should welcome all such views which conform to the Qur'ān and the *Sunnah* and which are capable of meeting the demands of our age.

Attempts made during the past few centuries by some of the Muslim powers to codify the Islamic laws could not fully succeed

because, instead of adopting the entire jurisprudenee of Islam, they laid emphasis upon some particular *Fiqh* as their source. Due to this limitation, they could not bring forth any matchless code of law and soon their weaknesses became manifest. After these failures, we observe that in the immediate past it has been the general tendency to adopt the entire Islamic jurisprudence as the source of our law and this is a step in the right direction. I have discussed fully all these tendencies in my book *The Problem of Juristic Differences in an Islamic State*.

Here I simply want to emphasise that in Pakistan we have to begin our task with a very broad-minded outlook and this should be so from the very outset. We should neither permit the old prejudices to impede our way nor allow fresh ones to crop up and block the progress.

TO THOSE IN AUTHORITY

My submissions to those in power in the country are as under:

(1) Now that the Constitution of Pakistan has been framed, the ideological tussle which has been raging in this country ever since the inception of freedom must now be brought to a close. The Constitution has laid our destination and those in authority should now reconcile their minds to it and work it unreservedly, honestly and sincerely.

So far the situation has been that the masses and the *'Ulama* have felt relief and contentment at the framing of the Constitution and they all yearn to see the social and political evolution of this country on lines envisaged in this document. But as far as those in power are concerned they appear to feel that the passage of this Constitution is an undesirable incident and consequently they feel great strains in carrying out the ultimate responsibilities entrusted to them thereunder. Perhaps it is due to this fact that not a single step has been taken by them so far towards the fulfilment of the demands of this Constitution. People fail to see any signs of its enforcement and fructification on the political and social horizon of the country.

The tussle that raged between the Islam-loving forces and the forces of secularism during the phase of constitution-making

still persists. A wide chasm between profession and practice still exists. Confusion of thought and policy is writ large on the horizon. Sinister moves are being continuously made to popularise un-Islamic ideas under false facades. Anti-Islamic elements still fervently nurture the desire to banish Islam. The main cause of all this confusion, double talk and misbehaviour is that the ruling class has not yet reconciled itself to the real spirit of the Constitution. They are not clear about our national destination. This wavering attitude has deprived them and, through them, the entire country of the real benefits of this Constitution. After all, what is the significance of the Constitution? It is not an article for adornment. Its real significance is that it sets the lines of a country's future evolution. If we fail to utilise our Constitution in the proper direction it would be tantamount to defeating the very purpose for which the people have clamoured and struggled for full nine years. The minimum that should have come out as a result of nine years of strife and struggle should have been the development of a definite and decisive approach towards our problems. The double-minded and double-faced behaviour which persists even to-day is totally out of tune with the demands of the Constitution. It is unfortunate that the *Jāhilīyah* which was being formerly patronised at every step in the name of Islam is still being patronised. Unfortunately those in power little realise that this attitude of theirs is creating a very bad impression upon the minds of the Muslims. It would have been far better for them to do anything openly in the name of *Jāhilīyah*, but to compile reports in the name of the Book and the *Sunnah*, as has been prepared by Khalifa Abdul Hakim and his companions, is such a cruel joke with Islam that no sensible Muslim can forbear it. Those in authority must mend this attitude if they want this country to grow and prosper.

(2) According to the Constitution, the real body authorised to compile and formulate the Islamic laws in this country is the Law Commission, which the President is to appoint. Now all hopes of the country lie with this Commission. If this Commission is constituted of the right type of persons, then the people will have some reliance on the assurances, given in the Constitution, about the early enforcement of Islamic laws. Should, however,

this Commission be composed of persons like those on the Family Laws Commission, people will lose all hope in this Constitution. If the Marriage and Family Laws Commission have published their Report as a mere feeler, as some people think, then I can hope that this feeler might have served as a good eye-opener to the Government. There is no place in this country for the type of Islam they wish to 'manufacture.' The Government should learn from this experience and behave in a more prudent way in future. They should select the best of the people, men who are well versed in Islam and in whom the people have full faith and confidence. Those selected from the *'Ulama* should be such as enjoy public faith and following. Persons selected from among experts of modern law should be such as believe in Islam and have real faith in it. Those who have lived their entire lives mutilating Islam and ridiculing it cannot do any good, if they are taken on the Commission. Rather it will generate contempt and hatred among the masses and the people will get disgusted with the Government and the Constitution. It is my ardent desire that the President of the Republic discharges his responsibilities with prudential foresight so that the hatred and disgust created by the Report of the Family Laws Commission may be removed.

(3) Unnecessary legislative actions are futile when some set objectives can be achieved through the means of mass propagation, social persuasion and general education. Laws can impose restrictions but they cannot convert the people or change their convictions. The culture and civilisation of a nation bear prints of those realities alone which are infused into their mind and soul through education, precept and persuasion. It is most unfortunate that all our resources of publicity and information are employed for propagating absurdities, day in and day out. If we utilise these means for educating our masses we could well bring about a social revolution and thus be relieved of much of the unnecessary law-making. If we want our people to preserve marriage and divorce records or that tender-age marriages should be stopped, it is not necessary that we should force them to do so through the use of the iron rod of law. The benefits of the contemplated measures could very easily be put into their minds

through education and better methods of persuasion. By gradual practice the collective instinct of society will assimilate it and the society will itself become its guardian. Law is needed where education and propagation do not help eradicate an evil and where outright destruction of public rights is apprehended. If standard *Nikāḥ-nāmās* and *Ṭalāq-nāmās* are made available to the people and they are educated in regard to their utility and importance, there is no reason why they should not gain usage in society after a short time.

(4) Three of the issues which the Commission have raised require careful attention and consideration. They are: the question of three divorces at one sitting; elimination of the abuses of polygamy, and the problem of the rights of orphans. I want to explain in the following pages the responsibilities of an Islamic state relating to these three problems. If the Government of Pakistan deliberate on these issues in the light of my submissions they would definitely be able to solve all these problems in a peaceful and proper manner.

The problem of three divorces

Opinion of the Muslim legists is divided as to whether three pronouncements of divorce at one sitting are irrevocable or not. The majority view is that such a divorce is irrevocable. A small section of our legists is, however, of the view that it amounts to only one pronouncement and as such is not an irrevocable divorce. Anyway all are agreed that this is a very hasty and clumsy way of divorce and is not in full consonance with the *Sunnah*. Not only the *Sunnīs* are agreed on this point but, to the best of my knowledge, even the *Shī'as* are unanimous on the point. It is a very sad affair that the majority of our lower and upper classes are totally ignorant of the fact that this method of divorce is not in conformity with the Book of God and the Holy Prophet (peace be on him) has expressed his disapproval of it. His companion, 'Umar ibn al-Khaṭṭāb, awarded punishment to such divorcers and ultimately, just in order to stop this undesirable practice, he enforced the divorces at one sitting, without any consideration as to the circumstances under which they were pronounced.

We have now nearly lost view of this aspect of the problem. The common belief is that this is the ordinary way of divorce and

particularly the Ḥanafite way of divorce. This misunderstanding is so deeply ingrained in the common mind that if one were to point out that the Ḥanafites themselves regard this way of divorce as inappropriate and that in an Islamic state such divorcers are liable to punishment, one would be simply gazed upon in amazement.

To a great extent this common ignorance of the people is due to the fact that Muslims have since long ceased to enjoy the benefits of an institution which performs *amr bi'l-ma'rūf* and *nahī 'ani'l-munkar* (bidding right and truth and forbidding evil and injustice). The second cause is the general carelessness of our Ḥanafī *'Ulama* in this respect. They will forgive me for the frankness if I say that it seems as if they think that their responsibility ends by giving *fatwa* in such cases of divorce and that it is not their duty to educate the people in the *Sunnah*. Generally, they do not try to check the violation of the *Sunnah* which is involved in it. They do not feel responsible for the eradication of wrong practices. Had our Ḥanafī *'Ulama* realised their responsibility in this behalf and educated the people through their writings, speeches and verdicts, that, even though such a divorce does become effective, it is repugnant to the spirit of the Qur'ān and the *Sunnah* and that it involves sin and deprives man of the facilities and blessings bestowed by God, there would not have been any cause left for the people to get accustomed to such hasty practice and more so to deem it as the prescribed way!

If, now, the Government intend to amend this wrong practice of divorce, the most expedient way to do so is not to thrust upon the public an ordinance against this long-practised customary way. The right step would be to inform them of the appropriate way for which various methods could be employed. For instance, distinguished *'Ulama* should be invited to give talks on the Radio, in which the evils of hasty divorce should be exposed and the wisdom of the Prophet's way in this respect explained. Furthermore, it should be clearly told that a person commits sin by making three pronouncements of divorce at one sitting. Books and pamphlets should be published on this subject and in public speeches and Friday sermons people be made aware of the correct position. This being an undisputedly accepted position, it

will soon find its proper echo in the hearts of the people. If, after all these measures, this tendency persists, a provision could be made in the law to punish such divorcers and this would act as the proper deterrent.

Polygamy

Corrective action in respect of polygamy is required in cases where people wed second wives in the presence of the first, but do not care for the conditions imposed by Islam. They marry the second wife because Islam has given them such permission, but they ignore the conditions of equitable treatment and justice attached to this permission. They do not treat the first wife in the proper way and do not fulfil their responsibilities as husbands. The poor woman is kept in suspense and she is unable to live a contented life. To me there are two major reasons behind this sad and unfortunate situation. The first is the absence among women of proper realisation of their rights. They would pass their whole life in suspense, but would not have enough courage to endeavour to have matters reformed. The second reason is that even if they do realise their rights and try to achieve them there exists no sympathetic machinery from which they could seek help. Our present judicial system is so expensive, so complex and so inefficient that it is well nigh impossible for the poor and the weak to get justice through it.

To remove these evils three devices could be adopted quite easily. First of all, the social reform organisations of the country, and specially the feminine organisations, should create in the women the required consciousness in regard to their rights. Through speeches, writings, and individual and collective contacts even the village women should be informed of the rights Islam has granted them and the means through which they can achieve them. In this respect, the Information Department of the Government should co-operate with public institutions and feminine organisations. Secondly, *Panchayats* should be organised on a vast scale, particularly in the rural areas. These *Panchayats*, in addition to their other reformatory programme, could, to a great extent, be instrumental in removing such family injustices. For this purpose some special powers may also be delegated to them. Lastly, an efficient machinery for the disposal of such disputes should

be established. In this respect matrimonial courts, as suggested by the Commission, should be organised. They would prove effective instruments for the establishment of justice in family life.

If these three devices are adopted, I am sure that not only those injustices will be removed from our society which have cropped up owing to the misuse of the permission of polygamy, but that any excesive practice of polygamy if there be any in any community will also gradually disappear.

The problem of the orphans

The case of the orphans is not to be considered merely from the point of view that some of them do not receive any share from their grandfather's property. This situation arises in the case of a few among thousands and generally in good families such difficulties are solved easily. I can say from any personal knowledge that in most of the cases love and affection of the uncles and the grandfather have resolved this problem very beautifully. Supposing this problem remains unsolved, we will have to ascertain as to how many among the hundreds of thousands of orphans in this country are really affected by it. Even if one were to scrap the entire Islamic law of inheritance and try to solve it in one's own way, what percentage of orphans will have their difficulties actually solved in this way? There are thousands of such orphans whose only sustainers are their fathers and after them they are left with none to look after them. They do not inherit even a single inch of land or any other source of livelihood. That is why Islam has taken up the problem of orphans on collective rather than individual basis. It has solved this problem as a whole and not only in regard to those who could not avail of a share in their grandfather's property.

Islam has laid important responsibilities on the individuals, the society and the state in connection with the orphans. According to Islam, no individual can be a true Muslim, no society an Islamic society and no state a really Islamic state, unless they all perform their respective duties in respect to the orphans.

Islam has enjoined upon each person to take care of the orphans of his own family. It is the primary responsibility of the individual to look after his unprotected relatives and orphans. If an orphan has inherited any property, his guardian is responsible

for its management. As far as possible, he should manage this without any remuneration and should never incur an expense which is detrimental to the orphan and his interests. In case an orphan has not inherited any property, Islam declares that such an orphan deserves the best and choicest of benevolence from his guardian and other relatives.

Islam makes it the responsibility of society to meet the expenses of the poor and the orphans through a scheme of social assistance. It enjoins upon the wealthy people to pay a certain amount for the care of the poor and the orphans only (*Zakāt*). The collection of this tribute from wealthy individuals has been regarded by Islam as a right, and if anybody refuses to pay it, the amount can be recovered from him by force. Islam is so very particular on this point that if need be even punitive measures can be taken against defaulters.

It is also the basic duty of an Islamic state to look after the orphans. An Islamic state is so conscious of this responsibility that the upkeep of the orphans has been specifically referred to as a principal avenue of public expenditure, so that the state may not ignore the welfare of the orphans in any of its development schemes. It was due to this dominant right of the orphans that 'Umar used to term the state treasury as an 'Orphans' Trust' and did not think it proper to draw from it more than the barest minimum. The Qur'ān gives it such an importance that it mentions the right of the orphans on the Islamic state only next to the right of the Holy Prophet (peace be on him) and his kith and kin. This mention has been made not in connection with *Zakāt* or *Ṣadaqāt* but in connection with state expenditures in regard to war acquisitions and booties—(viii. 41).

In short, in a real Islamic state, the question as to whether an orphan shares his grandfather's property or not is of no significance at all. The state undertakes his responsibility and, instead of throwing him on the grandfather, brings him up to stand in life on solid grounds. Those who try to find fault with the Islamic laws of inheritance on this count and try to call it an antiquated and cruel system are in fact awfully ignorant of this aspect of the Islamic system of life. Islam bestows the greatest number of rights upon the orphan. If you want to solve the problem of

orphans in this country, do it in the way Islam has suggested. There is no sense in blaming Islam for depriving the orphan from his grandfather's inheritance, when the prevalent wrong system has usurped all his rights and privileges.

TO THE LEADERS OF MOVEMENTS FOR FEMALE EMANCIPATION

In the end, I would like to say two things to those of our Muslim sisters who want to give lead to the women of this country. First, they should carefully deliberate and then decide as to whether they want to follow in the footsteps of the western women or to adopt the Islamic scheme of life and enjoy the rights which Islam has bestowed upon them. If they wish to follow the western women, it will be very kind of them not to drag Islam in the pursuit of their thrilling adventures. Islam is not their most obedient servant. It cannot be made to sing to their tunes and follow them everywhere with folded hands. Instead of employing the name of Islam, they should come in the field with slogans used by the western women and should openly declare that their goal is the western type of freedom and equality. I do not know how costly their struggle would then be for them, but it would give them greater courage and freedom if they shed off duality of thought and become single-minded. Success in a struggle can be had only if it is fought freely, courageously and without a wavering mind. With duality of thought you can achieve nothing.

Should they, however, decide to work for the achievement of the rights which Islam has bestowed upon them, they are most welcome. Every Muslim of this country will back up their demand and lend them his full support. They should by all means have their rights, and if need be through the help of law. If the present Government do not give them their rights they shall have no claim to be called an Islamic government. God willing, they will not have to struggle or campaign for this in case the social and cultural evolution of this country takes its proper course as has been envisaged in the Constitution. For this purpose, they need open no separate front but should strengthen the existing movements, striving hard to get the real Islamic laws enforced in the

land. Then it is necessary that they should also fulfil the obligations and responsibilities which Islam has enjoined upon them. For if they disregard those duties or restrictions which Islam has imposed upon them and ridicule them openly, nobody would believe in their lip-service to Islam.

Secondly, I fail to understand why your feelings are so aroused and your passions so bitter against polygamy which is practised very rarely in our society and why you are not offended at the new and perverted form of polygamy which one finds everywhere around in the modern society: in clubs and gatherings, hotels and restaurants, dinners and picnics, co-educational institutions and social functions, night clubs and other centres of undesirable enjoyment. Why do you not feel disgusted and get vocal in your protests against this neo-polygamy which the western civilisation has spread and because of which promiscuous life has become the order of the day? The new vistas, opened up by the free mingling of the sexes, have hardly left any woman in the modern society who can have the contentment that her husband's life and money are not being shared by innumerable 'second wives.' In the face of wide prevalence of this type of polygamy, and its increasing spread even in our society—particularly in the upper classes—one simply fails to understand your clamour against polygamy. If a thing is bad, it should be condemned in all its forms and not in the one alone which is the best of all.

Some people would contend that the western society has given equal freedom to both the sexes and when there is complete equality there would be nothing to grudge. But nothing can be more absurd than this contention, for one fails to understand how a thing can be deemed evil if only one party resorts to it but a blessing and virtue incarnate if both the parties indulge in it. This is a queer and unintelligible piece of logic and I totally fail to follow it.

I wish my respected sisters could only think over these questions and see whether they are not making their position quite anamolous by adopting a double-faced attitude.

Chapter 5

SOME REFLECTIONS ON THE MARRIAGE COMMISSION REPORT

By

KHURSHID AHMAD, M.A., LL.B.

The Report of the Commission on Marriage and Family Laws appeared in June 1956. When the Commission was appointed in August 1955 some new hopes had been kindled, despite the widespread suspicions about suitability of the personnel and the method of constitution. It was, however, hoped that some adequate solution to one of the basic social problems of our society might be arrived at and recommended. But the Report has fallen upon those hopes like a wet blanket. The analysis presented therein is superficial, the approach too unimaginative and the recommendations no more than a hotch-potch of modernity and westernism. It seems that the Commission have completely failed to extricate themselves from the contemporary western social and legal concepts and to rise to the heights of unadulterated Islamic thinking. It is as unfortunate as it is tragic.

The Report has been criticised by all the leading sections of public opinion. And perhaps the best evaluation has come from the pen of Maulana Amin Ahsan Islahi. However, certain aspects of the Report deserve further discussion and criticism. The following observations are being offered to discuss those aspects.

I. WHERE THE REPORT FAILS

THE Commission on Marriage and Family Laws was entrusted with an onerous task. There can be no denying the fact that under the spell of alien influences the Muslim institution of family has been exposed to many a stress and strain. During the last so many centuries, innumerable local and un-Islamic practices have made inroads on Muslim society. Law and life both have been influenced to some extent by the Hindu and western concepts. And the need to purify Muslim society, to establish Islam in its pristine purity, is immense. It was with the avowed purpose of reviewing the whole situation from the *Islamic viewpoint* and suggesting ways and means to ameliorate these conditions that the Commission were appointed. They were assigned the gigantic task of paramount importance that deserved the most careful devotion, sustained effort, painstaking research and honest labour. Have the Commission really done justice to the task entrusted to them? After a careful study of the Report, one is compelled to feel that they have not.

The ideas presented in the Report are superficial and no proper care has been taken to assess the real and precise meaning of the Islamic terms which have been loosely and carelessly used. The work done by earlier Islamic scholars in this field has not been fully studied and utilised. It seems that the Commission did not deem it their duty to study thoroughly the problem in all its multifarious aspects and to avail of the valuable researches of the past.

Some members of the Commission did not take any active interest in the work at all. Only a few meetings of the Commission were held and those too were not attended by all the members. *One member did not take any part in the deliberations at all* and only affixed his valuable signatures![1] This is an index of their interest in and devotion to the task assigned to them! This shows how 'seriously' they took this all-important job!

The Commission did not even care to classify the opinions expressed in reply to their Questionnaire and have offered the

1. 'Mr. Enayat-ur-Rahman of Dacca did not find it possible to attend any of the meetings of the Commission.' *The Report*, p. 1207.

apology that:

'The answers given are various and difficult to classify or tabulate, but a careful investigation has made it possible to assess the general trends.'[1]

It is really very strange that a Commission entrusted with so important a task did not even try to classify fully the opinions which were given by scholars and other members of the intelligentsia. Perhaps it is the first Commission of its kind whose members, in their haste for presenting certain pre-conceived notions and views, did not even do justice to the replies to their own Questionnaire.

It is still more baffling that the members did not care to study all the laws and practices prevalent in this country. No facts and figures have been given by the Commission in support of their claims and they have sought refuge in the sheltering care of the ambiguous word 'often,' which has been used so often that one wonders whether the Commission had before them any data at all! The suspicion is strengthened when one reads in the Report that the Commission did not even ascertain in what parts of the country the customary law as against the *Sharī'ah* law is in vogue.

They confess:

'We are not in a position to know precisely at this time whether there are any localities in East Pakistan, Baluchistan or elsewhere, *where customary laws still prevail.*'[2]

In the light of these and other failings, we regret to observe that the Commission have not done justice to the great task entrusted to them. They have treated the problem too lightly—and the result is a report which is shallow, superficial, unrealistic, and a hotch-potch of conflicting ideas.

Terms of reference disregarded

The terms of reference of the Commission were as follows: 'Do the existing laws governing marriage, divorce, maintenance and other ancillary matters among Muslims require modification *in order to give women their proper place in society according to the fundamentals of Islam*?' The Commission were asked to report 'on the proper registration of marriages and divorces, the right to divorce exercisable by either partner through a court or by other

1. *The Report*, p. 1198.
2. Ibid, p. 1222; emphasis ours.

judicial means, maintenance and the establishment of Special Courts to deal expeditiously with cases affecting women's rights.'[1]

It is clear from these terms of reference that the real task of the Commission was to find out the flaws and discrepancies in the current marriage laws and to suggest changes from the Islamic viewpoint so that *women may attain 'their proper place in society according to the fundamentals of Islam.'* But what have they done? They have tried to devise a new edition of Islam. They were asked to modify the existing law so that the law may come in conformity with Islam; instead, they have embarked upon a venture of 'modifying' Islam itself to make it conform to the standards of *pseudo*-modernity. They have attempted to revise the very basic principles of Islamic jurisprudence. They have offered, in the name of an unnecessary and uncalled-for 'introduction,' a new-fangled interpretation of Islamic law and its legal history. One fails to understand how the Commission arrogated to themselves the power and authority to give a discourse on religion and jurisprudence and make that a part and parcel of the report?[2]

Then they have also embarked upon a discussion of problems which had no direct relevance to their terms of reference. As an instance we may refer to the following:

(*a*) The problem of legislation to the effect that guardians of the minors shall have no authority to sell or mortgage the property of the minors.

(*b*) The question of the inheritance of the children of a predeceased son or daughter and the Commission's recommendation that 'legislation should be undertaken to do justice to the orphans in respect of the property of their grandfathers.'

(*c*) The discussion relating to the Waqf 'Alal Aulad Act, 1913.

We know that Muslim *Fuqaha* have discussed the problems of inheritance, etc., under the topic of *Munākahāt* and that the 'Muhammedan Law' also regards them as a part and parcel of the personal law, but the Commission were not appointed to discuss all the problems of 'Muhammedan Law.' They were to deal only

1. *The Report*, pp. 1197-98.
2. The Note of Dissent by Maulana Ehtishamul Haq extensively deals with this question.

with that part of it which is related to marriage, divorce, etc., and that too with the purpose of 'giving *women* their proper place in society according to the fundamentals of Islam.' One wonders how the Commission thought it proper to opine over those problems of Muhammedan Law which had no relevance to their immediate terms of reference.

Unbalanced approach

One is pained to see that not only the Commission had arrogated to themselves the work with which they had never been assigned but their approach to the problems which they have discussed has been out and out unbalanced, distorted and unrealistic. They thought it appropriate to give lengthy discourses on the dynamism of Islam while totally disregarding the role of traditions and the importance of continuity in the cultural and legal life of a nation. They have given undue importance to the question of polygamy but have totally disregarded other very bitter, very live and very baffling problems that beset our womenfolk. They have totally failed to take even the slightest notice of the modern threats to the institutions of family and marriage—threats which are becoming a menace to the very existence of our social fabric. They have administered lengthy sermons on the evils of a second wife but have not even cared to mention the plight of the mistresses which are a scar on our society. (Mistress-keeping should have been made a cognizable offence.) They have not thought it advisable to study the condition of the widows whose misery is inexplicable and whose number is many times more than the much talked about deserted 'first-wives.'[1] And what about the question of *zina*, the greatest threat to the peace, happiness and tranquillity of the family? Every student of law knows that there is a world of difference between *zina* and what Pakistan Penal Code calls 'adultery' and 'rape.'[2] Why did the Commission ignore this question? Moreover, there is the problem of the judicial rights

1. The 1951 census reveals that there are more than 33,20,000 widows in Pakistan. That comes to a little less than 5% of the population and nearly 10% of the female population of Pakistan (vide *Pakistan Statistical Year Book*, 1955, p. 7).

2. According to Sec. 375 of P.P.C., 'Rape' is that sexual intercourse which is committed with a woman of less than 14 years of age or with one of 14 years or more *without her consent or against her will*. As such if it is committed with her consent and if she is above 14 years of age, it is not a crime according to this section. 'Adultery,' according to Sec. 497 of the P.P.C., is 'sexual intercourse with a person who is and whom he knows or has reason to believe to be *the wife of another man, without the consent or connivance of that man*, such sexual intercourse not amounting to the offence of rape.' Thus if it is committed with the consent or connivance of the husband and with the consent of the woman concerned, *it is not a crime at all*. This concept is totally repugnant to the Islamic concept of modesty.

of women. In Islamic history we find that Muslim women have enjoyed a number of judicial rights to get the wrongs corrected. But the Commission have not thought it advisable to discuss this problem too. In short, one is left with the impression that the members of the Commission never tried to study the problem as it is, but approached it with some pre-conceived notions with the result that the Report has remained unbalanced, unrealistic, and distorted.

Modernism versus *orthodoxy*

Another feature that strikes the reader is that calculated attempt has been made in the Report to enlarge the gulf and create a conflict between the 'liberal' and 'modernised' and the 'orthodox' elements of our society.

After the failure of the Mujahidin Movement and the War of Independence of 1857 Muslim society was divided into two groups. One group tried to bycott modern thought and western civilisation in its entirety. The other group tried to emulate the West in thought and life. With the introduction of New Education the cleavage increased and became wider and wider. The renaissance movements in the world of Islam have tried to bridge the gulf, bring the two groups together and evolve a synthesis.

The establishment of the Islamic Republic of Pakistan has now decided the future ideology of the state. As such the greatest need of the hour is the elimination of this schism. But the Report has attempted to widen the schism and re-ignite the fires of the conflict. It has wittingly or unwittingly tried to instigate the modern educated people to rise against the so-called 'conservative' and 'rigid' elements. Instead of exploring the avenues of co-operation, it has fomented sectional hatred and conflict. No country has ever gained by mutual conflict amongst its own forces. How can we reap any benefit out of such a conflict? This is the greatest disservice that the Report has done to the cause of the future

progress of Pakistan.

Despotism or democracy?

After a thorough study of the Report, the student of law is confronted with a queer situation. He is unable to find out the conception of the function of law in the minds of the learned members of the Commission. They pay lip-tributes to Islam and democracy, but the suggestions they have made smack of despotic and totalitarian approach to law.

In an Islamic democracy the respect of the individual is a fundamental value. The state is for the welfare of the individual, not the individual for the state. The dignity of the individual and the respect for his person are inviolable postulates of law. Law must not encroach upon the fundamental liberties of the individual. Its function is to establish justice—not to deprive man of his discretion. The recommendations of the Commission are a threat to the liberty of the individual and are based on the vicious presumption that people cannot be relied upon. This concept is the very anti-thesis of the democratic approach to social problems. The Commission's apology that 'prevention is better than cure' is not only untenable but is extremely dangerous. Law 'prevents' by assuring justice—not by curbing human liberties. If this philosophy is accepted, then the days of democracy are numbered.

Disservice to Islam

The Report, because of its disbalance and one-sidedness, has gived birth to many misunderstandings about Islam and Muslim society. A very wrong and exaggerated impression is cast upon the minds of the readers about the extent and gravity of the problem of polygamy. Christian critics are bursting with joy over the great job done by these 'Muslim reformers,' a job that they themselves could not do despite all their efforts throughout the last so many centuries. Those who have an eye upon the world Press know that the Report has only lent support to the adversaries of Islam. It has done great disservice to Islam and to the prestige of Muslim society.[1]

1. *The Singapore Standard*, Singapore, in its issue of 9 July 1956 writes editorially:

'Polygamy appears to be on the way out—at least in Muslim countries. Muslim women carried out a determined and undaunted campaign to end this age-old privilege which allowed the Muslim male to have *at least four wives.* [What wonderful information!]

'This is, indeed, revolutionary reform for these women had to accept their husbands' matrimonial peccadillors for as long as history of their origin can be traced. The Commission did a thorough job .. and the results call for the most sweeping changes in the accepted Muslim Laws and Traditions. The Commission wound up its report on a strikingly modern note that is worth repeating. "As humanity takes further strides towards social justice, many institutions shall be scrapped by the advance of time. To hold Islamic society by making it conform in details to patterns which prevailed at one time, but which have lost all meaning now, is the surest way to make society dead or decadent."

'In other parts of the Islamic world, there will be a stronger urge now for action by the authorities to end this much abused custom of polygamy, which allows the Muslim male to distribute his favours to whosoever pleases his fancy.'

This is how others, looking through the glasses of this Report, are thinking of us!

Towards the 'modification' of Islam

Last, but not least, one is surprised to find that, although the Commission were asked to study the problem 'according to the fundamentals of Islam' and that despite the claim that 'the Commission has proposed no new rights for women which the *Qur'ān* and *Sunnah* had not already granted them; it has proposed only to implement these rights,' and that in some cases the Commission have 'preferred the injunctions of the *Qur'ān* and *Sunnah* to the interpretation of the later jurists.' Still on their own admission the Commission stand guilty of *modifying* Islam and of *adopting some of its injunctions and rejecting others.* The *'Ulama* and the learned scholars have categorically said that the Report has been prepared in open disregard of the injunctions of God and His Apostle but the fact is that a careful study of the very Report reveals that they themselves have had to confess of it.

After all, what do the following mean:

****'The primary object was to revive in a slightly MODIFIED FORM the rights granted to women by Islam.'[1]**

****'It will be noted that . . . every reform proposed emdies only in a SLIGHTLY MODIFIED from the spirit and trends of original and unsullied Islam.'[2]**

****'That we have always kept the injunctions of the Holy *Qur'ān* and the *Sunnah* in view in proposing CERTAIN reforms.'[3]**

1. *The Report*, p. 1231. 2. Ibid., pp. 1229-30.
3. Ibid., p. 1229.

What does CERTAIN mean in this context? Can it mean anything other than 'some' and 'a few'? If so, are they not guilty of 'modification,' 'amendment' and adoption of some and rejection of other injunctions of Islam? And it is perhaps out of modesty that the members say they have modified Islam only slightly. The fact is that they have done so in full measure!

2. THE REPORT AND THE NOTE OF DISSENT

ONE member of the Commission, Maulana Ehtishamul Haq—and everyone will feel that he was the only person in that Commission who could be taken to have any knowledge of the Islamic laws—has strongly disapproved of the Report and has dissented from it vehemently. In his lengthy note of dissent, published in Gazette Extraordinary dated 30 August 1956, he has disagreed with most of the recommendations of the Report and has asked for *its total rejection*. It is strange that *the Report of the Commission and the Note of Dissent have not been published under one cover*. The Report was published without the Note of Dissent. It is perhaps the only instance in contemporary literature. As such the reader of the Report is not given the opportunity to understand the other viewpoint and, until the writing of these lines, they were not published under one cover. This is indicative of the honesty and broad-mindedness of our *pseudo*-reformers! This is an instance of their tolerance towards differing viewpoints!

It is said in the Report that Maulana Ehtishamul Haq has disagreed on three or four points only. But a study of the Note of Dissent shows that he has disagreed on all matters save three or four. What a correct representation!

Some extracts from the Note of Dissent are reproduced below to show to the reader the view of the dissenting member, whose note was not included in the Report.

'I have received the Draft Report of the Marriage Commission, which, after three or four sittings of the Commission, has been sent to its members for their opinion. This draft starts with a long Introduction, which not only unsuccessfully attempts to undermine the accepted tenets of Islam and the fundamentals of Islamic Shariat but is also irregular and unconstitutional, for not a word of this Introduction was ever brought before the Commission

for discussion. It is most arbitrary to make the un-Islamic views and personal caprices of a layman as the Introduction to and the basis for the Report of the Commission without the knowledge or consultation of its members. Of all the irregularities that have so far been committed in the transaction of the Commission's business, this is by far the worst and most unpardonable, especially when I have serious differences of opinion on the actual issues of the Report, which I am going to set out in this Note. An insinuation of my acquiescence with the unreal and imaginary principle underlying the Introduction, would just render those differences of opinion unreasonable and ineffective. I, therefore, most emphatically protest against the un-Islamic views and the unconstitutional character of the introduction' (pp. 1560-61).

IRREGULARITIES

'The first meeting of the Commission, held on the 5th October in Lahore under the Chairmanship of the first President of the Commission, the late Dr. Khalifa Shuja-ud-Din, devoted itself to the discussion of the procedure to be followed. The women members of the Commission put forward the proposal of eliciting public opinion through a Questionnaire asking common men and women to give their opinion on questions of marriage. As I objected to this proposal on principle, the President turned it down and added that under the terms of reference the Commission could not consult public opinion or act upon it in matters of Shariat because it was bound by its terms of reference to make its recommendations in accordance with the Islamic Shariat. This meeting, however, did express itself in favour of a different type of Questionnaire to acquaint itself with the existing difficulties of the women of various societies, families and areas so as to see the hardships facing women in their true perspective. But it is extremely bold on the part of the Commission that the proposal was neither recorded in any minute-book nor were signatures of any member obtained. Instead, after the sudden demise of the President, a Questionnaire different from the one agreed to was issued by the office of the Commission. In the Questionnaire not only were common people invited to give their opinion about matters relating to Shariat, but an attempt was also made to twist the translations and interpretations of the holy text to suit the Commission's own purpose' (p. 1562).

AN ATTEMPT AT THE DISTORTION OF ISLAM

'. . . while stating the reasons for the constitution of the Commission it has been admitted that in accordance with the clear

directive of the Objectives Resolution relating to the Constitution the source of the Commission's recommendations will also be the Holy Quran and the Sunnah but this admission too is just a piece of deception, because the real question is of deriving the principles from the Holy Quran and the Sunnah. The real criterion of accepting them as the source of law is whether in drawing conclusions the relevant principles have been kept in view or only personal predilections and individual judgment have been relied upon. "Fiqh" in fact means adherence to principles and rules in deducing and deriving conclusions and "Ijtihad" is to formulate principles and rules and form general conclusions from particular instances. Now forming of general conclusions from particular instances is not possible until one has before his mind all the instances to which the injunctions of the Holy Quran and the Sunnah are applicable. Any attempt on the part of those who do not know one single provision of the Holy Quran and the Sunnah correctly, to form general principles and draw conclusions, is deviation from the right path and complete ignorance. The members of our Commission, who hasten to declare, so sweetly, the Holy Quran and the Sunnah as their source and fount, are neither prepared to perform the feat of codifying a new set of laws of jurisprudence in supersession of the existing one by generalizing from specific provisions, nor are they willing to be guided by the established laws of jurisprudence as their guiding star and beacon-light. It is obvious, therefore, that to take personal and individual whims as the basis for the derivation of laws and principles is neither "Fiqh" nor "Ijtihad" but amounts to distorting the religion of God and the worst type of heresy. In spite of their blatant departure from the views of the Muslim commentators and jurists, no member of the Commission could take the place of Fakhruddin Razi or Abu Hanifa. This is the reason that certain recommendations, which reflect subservience to the West of some of the members and their displeasure with Islam, constitute an odious attempt to distort the Holy Quran and the Sunnah with a view to giving them a western slant and bias' (p. 1564).

ON IJTIHAD

'This means that in legal phraseology the Quran is the text of law and Hadith is explanation of law; the juristic researches of the "Mujtahideen" are such precedents as only qualified judges can establish. The decision of an unqualified judge is never preserved in courts as a precedent. If our author of the Introduction is fond of "Ijtihad," he should frame his own principles of jurisprudence which should be different from those of the four prominent

schools of Muslim law and which should lay down new rules and principles of derivation. If he succeeds in doing so, we shall be only too glad to recognize a fifth school in addition to the four which are already there. But drawing of conclusions in the absence of any set rules and principles is just impiety and vainglory. The authors of the Introduction want to give this "vainglory" of theirs the name of "Ijtihad" which can never be accepted.

'The author does not know that "Ijtihad" is a difficult task and that these days it is difficult for him, to exercise even that type of "Ijtihad" which is called "Qiyas," and which shall continue to be exercised and resorted to till the end of the world. The excerpt quoted from the lectures of Allama Iqbal also relates to this type of "Ijtihad." Even so, the late Allama Iqbal has advised against accepting the "Ijtihad" of shortsighted scholars.

زاجتہاد عالمان کم نظر اقتدا بر رفتگان محفوظ تر

[It is safer to follow the footsteps of the bygones than the "Ijtihad" of shortsighted scholars)' (p. 1568).

BEYOND TERMS OF REFERENCE

'In short, it would he hard to point out all the errors. The whole Introduction is a curious admixture of confusion of thought, contradictory statements, misunderstanding and brazen-facedness. What is more, the Commission has completely exceeded its terms of reference. This Introduction, therefore, was not fit to be included as a part of the Report, and, even now, it should be dropped from the Report; or else this criticism of mine be published along with it, so that no misunderstanding arises in the public mind that the Introduction embodies the unanimous views of the Commission' (p. 1576).

After discussing the points raised in the Introduction, the author of the Note of Dissent gives his views on each and every question and disagrees with the recommendations of the Report on nearly all major points. In the end he says:

'The Islamic social system is a complete system. It shall have to be accepted or rejected in its entirety. It is not possible to accept or reject it in part or act against the warning in the Holy Quran: "Do they believe in some parts and reject others?"

'This report is an undesirable attempt of this sort and from every point of view, religious or intellectual, deserves complete rejection. This is my recommendation' (p. 1604).

3. THE REPORT AND POLYGAMY

THERE has been much ado about polygamy. It seems that the members of the Commission were haunted all along by the spectre of polygamy. That is why they have given undue importance to this question. Their views on this topic deserve to be discussed in detail, because they have been responsible for creating a lot of confusion about Islam and its social order.

The Commission's analysis and suggestions are as follows :

—Polygamy is an evil and a curse for 'the practice of it is prompted by the lower self of men who are devoid of refined sentiments and are unregardful of the demands of even elementary justice.'

—It is an institution which has out-lived its utility. Muslim society has marched ahead of it and 'to hold Islamic society by making it conform in details to patterns which prevailed at one time, but which have lost all meaning now, is the surest way to make society dead and decadent.'

—'Polygamy is neither enjoined nor permitted unconditionally nor encouraged by the Holy Book which has considered this permission to be full of risks for social justice and the happiness of the family unit.'

—As 'prevention is better than cure,' polygamy should be restricted and no person should be entitled to celebrate a second marriage without the permission of the Court. The Court must be satisfied that a genuine cause for the second marriage exists and that the person can support both the wives and their children at the standard of living to which he and his family are accustomed.... The Commission is of the opinion that this step will greatly curb the *unrestricted and uncontrolled practice of polygamy which causes so much distress in family life.*'

These, in a nutshell, are the views of the Commission on polygamy.

A thorough consideration of the problem reveals that these views are based on superficial beliefs and half-baked information. The fact is that our educated classes have been badly influenced by the culture of the West and have lost their critical faculties.

Christianity cherished a peculiar abhorrence for polygamy. This attitude became a part and parcel of the western culture and the educated classes of this country have succumbed to this very attitude. Through education we were made to imbibe the western values and consciously or unconsciously they are determining our bahaviour even to-day. Iqbal very rightly said that :

تھا جو ناخوب بتدریج وہی خوب ہوا
کہ غلامی میں بدل جاتا ہے قوموں کا ضمیر

[Whatever was 'wrong' gradually began to be taken as 'right'; for, under the spell of slavery, the conscience of a people is transformed.]

W. W. Hunter acknowledges this in his *Indian Musalmans* when he says :

'No youngman, whether Hindu or Musalman, ever passes through our Anglo-Indian schools, without learning to disbelieve the faith of his fathers . . . the rising generation of the sceptics . . .'

It is because of this alien influence that we are putting premium upon the western cultural values and are discounting our own traditions, without honestly and rationally considering the merits of any problem. The fear of polygamy is a product of this very bent of mind—a legacy of our cultural slavery of the West. We do not pause to think whether this attitude of the West is based upon reason or upon sheer prejudice and unreason. Instead of considering a problem on its merits, we just try to ape the West in thought and manners. Such members of our intelligentsia try to see through the western eyes, to think through the western minds and to talk through their tongue. This attitude is responsible for all the confusion that we see around us to-day. Let us consider this problem dispassionately and scientifically by throwing off all our prejudices and western biases.

The truth about polygamy

First of all, let us be clear that a very exaggerated picture of the extent of polygamy has been painted by the authors of the Report. It is not problem number one of our women. It is not widely spread in our country. Not more than ONE or ONE AND A HALF per cent of the married males have more than one wife. About the united India, the census reports reveal that not more

than twenty *persons in a thousand* had more than one wife. A careful perusal of the Census Report of Pakistan shows that the incidence of polygamy is not more than one per cent. A Dacca University survey about East Pakistan says that 'cases of polygamous marriages are in general rare, due, in part, to economic reasons.'[1]

The leading western authority on sex and marriage, Dr. Westermarck, is also of opinion that practically the extent of polygamy is not as great as is painted by so many critics. He says: 'The experience gained from peoples who permit polygamy teaches us that generally only a small minority of the men practise it. In the Mohammedan World, for instance, the large majority of men live in monogamy.'[2]

In the face of these facts, does not the tall talk about 'the menacing problem of polygamy' turn out to be 'much ado about nothing'? And, to be more frank, when one hears the so-called modernists raising this cry, one is wonder-struck at their shame-faced hypocrisy. It is an open secret that polygamy is not the worry of the common man and woman. It is being resorted to mostly by those very persons who pose as the champions of the cause of women's emancipation. It is their double-facedness which astonishes one most. It is not difficult to find out how many of those on the top-most rung like Prime Ministers, Governors-Generals, Governors and honourable Ministers have had more wives than one. How many of those who talk of women's liberty, day in and day out, live a life of polygamy? How many of the top leaders of the APWA are actually second wives themselves? The fact is that if this problem has any existence, it exists only in the upper circle of those who pose as upholders of the cause of womanhood and who are exploiting this slogan for motives not difficult to discern. And you cannot stop these people from misusing a genuine permission unless you eliminate the causes which give birth to their behaviour.[3]

1. Hussain, A. F. A., *Human and Social Impact of Technological Change in Pakistan* (A-I report on a survey conducted by the University of Dacca and published with the assistance of UNESCO), 1956, Vol. I, p. 81.

2. Westermarck, *The Future of Marriage in Western Civilization.*

3. Begum Shaista Suhrawardy Ikramullah has rightly said that an important reason for this rapid increase (of polygamy) is the easy contact between men and women which is now permissible and results in what are termed 'love affairs' which are then legalized into marriages. (*Dawn*, 23 September 1956). Unless you eliminate the causes you cannot cure the malady.

Thus we find that, first of all, polygamy is not widespread, it is a misnomer to call it a grave problem and that there is no 'unrestricted and uncontrolled practice of polygamy, and secondly that if some exploitation of the institution is being made, it is being made by those 'leaders' and well-to-do classes who appear as the pioneers of the movement of women's emancipation. And this has occurred because of certain causes which include the impact of partition on the family life, the growing westernisation of society and as a result of that increase in the free-mingling of both the sexes and the flirtations made by the new society girls to become the 'second wives.' If this misuse of the permission is to be checked, it must be done by removing the causes of the malady, on the one hand, and, on the other, by giving the women their judicial rights and by providing them with full opportunities to seek justice.

The Commission's views on polygamy spring from their peculiar concept of it. They think that it is fundamentally evil and base and as such the 'disease' must be curbed by all means—even by the use of the guillotine of law. We feel that the real fallacy lies here. It is wrong to think that polygamy is *essentially* base and evil. Our arguments in this respect are as follows:

(*i*) The Qur'ānic verse on polygamy, when read in the context in which it was revealed, points to an important social function of polygamy. The verse is as follows:

'And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two, three and four, but if you fear that you may not do justice to them, then marry only one' (iv. 3).

Now it is clear from this verse that Islam does not regard polygamy as an evil and as something undesirable. There is no halo of disapproval around this institution. At least the Qur'ān has not given the least iota of strength to that concept.

This verse was revealed just after the battle of Uḥad. In that battle seventy out of seven hundred Muslims had died. As such a

great social problem of the protection of widows and orphans had arisen. Polygamy was, in those days, an established institution of human society and was in vogue in Arabia. This verse was not revealed to make any legal sanction for polygamy; it was revealed to point out to a solution of their problem by resort to something that was already permissible. They were referred to the institution of polygamy to solve that problem and in this way make use of that social institution which had already been assimilated by the Muslim society. But as Islam wanted to reform that institution as well, along with pointing to this social and cultural function of polygamy and asking Muslims to resort to it for solving their problems, it also put a maximum limit to the number of wives that one may have and gave the instruction to observe justice.

This context very clearly shows the social utility of polygamy. The Qur'ān points out to this merit of the institution and does not at all regard it as bad or evil. In a certain situation it has actually encouraged it. The traditions of the Holy Prophet and the practice of the *Ṣaḥāba* further substantiate this view.

(*ii*) In our own days, we have the baffling problem of surplus women. The idea of the extent of this problem may be had from what Dr. Westermarck says:

'If we reckon the age of marriage from twenty to fifty years, the disproportion between the sexes makes at least three or four per cent women to be, *in normal circumstances*, compelled to lead a single life in consequence of our obligatory monogamy.'[1]

This view is corroborated by a study of the sex-wise distribution of population in most of the western countries.[2] But the situation further aggravates in the post-war periods. The following statistics, taken from the British Press, are very revealing:

'Over three million women in Britain are doomed to lonely lives without hope of husbands, child or a real home. The surplus women have gradually increased in the last century. In September 1939, there were 2,818,343 more women than men in Britain. Now the toll of war has taken nearly 300,000 men and many thousands are helpless cripples who will never leave their beds. "What is to become of thousands of girls who have lost husbands

1. Westermarck, *The Future of Marriage in Western Civilization.*
2. See *U.N. Social Survey* (1952).

and sweathearts, is one of Britain's post-war problems?" declares a woman correspondent of *Sunday Chronicle.*

'*Should every man decide to take a wife it is still estimated that nearly* 4,000,000 *women will go without husbands.*'

Shortage of men is not confined to Britain only. America has 12,000,000 spinsters to only 9,000,000 bachelors. In many parts of Europe men are almost stamped out.[1]

It is for this reason that Dr. MacFarlane, in his eye-opening book *The Case for Polygamy*, declares:

'Whether the question is considered socially or religiously, it can be demonstrated that polygamy is not contrary to the highest standards of civilization. *The suggestion offers a practical remedy for the western problem of the destitute and unwanted female: the alternative is continued and increased prostitution, concubinage and distressing spinsterhood.*'[2]

He is of the opinion that:

'The fact that polygamy has been practised is itself a proof that the sexes do not exist in the uniform proportion; and I am yet to learn that any widespread scarcity of women has been experienced in the past as the result of such a practice. *Even if there were an equal number of men and women in the world, the enforcement of monogamous marriages would involve as its logical corollary the compelling of every one to marry. On this point alone, without the aid of any other argument, monogamy, as a universal system, stands condemned.*''[3]

The throbbing facts and convincing arguments have made many a modern thinker realise the utility and the function of polygamy. Thus Sir George Scott tells us that:

'In our own century there have been not a few who, noting the preponderance of women, have advocated plural marriages for man.'[4]

(*iii*) Polygamy, sometimes, becomes indispensable for the preservation and maintenance of family life. There are occasions when a second wife is admitted to resolve some distressing situation in the family, for instance, marrying a widow of the family to support her and her children. Wife's barrenness and frigidity,

1. *The Statesman*, Delhi, quoted by M M. Hussain in *Islam and Socialism*, p. 194.
2. MacFarlane, J.E. Clare, *The Case for Polygamy.*
3. Ibid., p. 79.
4. Scott, Sir George, *Encyclopaedia of Modern Knowledge*, Vol. V, p. 2572.

or some infectious disease may make it necessary to have recourse to polygamy. The legitimate sexual needs of a man may impel him to polygamy. If the society is to be saved from the evils of adultery, concubinage, prostitution and immorality, the law and custom of the country must take full notice of man's nature and his needs. That is why Dr. Rom Landau says:

'In an imperfect world, such as we live in, polygamy must be considered both natural and legitimate. To eliminate polygamy completely we should first have to change the entire character of our civilization, then the nature of man, and, finally, Nature herself.'[1]

Throwing light upon the reasons for this belief, he says:

'In my own experience I have had many opportunities to study some of the most prevalent causes of polygamy among members of modern society. In most cases I have found that polygamous behaviour or polygamous longings went hand in hand with an essentially monogamous nature.'[2]

He concludes:

'All the evidence provided by history and science makes it imperative that polygamy should be recognized more honestly.'[3]

George Railigh Scott, the famous authority on sex, while discussing the nature of man, says:

'Man is essentially polygamous and the development of civilization extends this innate polygamy.'[4]

Similarly, Lord Mordey declared that 'Man is instinctively polygamous.'

Havelock Ellis, commenting on this statement, says that:

'If we interpret it as meaning that man is an instinctively monogamous animal with a concomitant desire for sexual variation, there is much evidence in its favour.'[5]

Professor C. Von Ehrenfels of Prague has gone to the extent of forcefully pleading that polygamy as the general order is much superior to monogamy. On the basis of scientific grounds he asserts that a 'Polygamic marriage order has become necessary' and that it will succeed monogamy because it is 'morally superior.'[6]

1. Landau, Dr. Rom, *Sex, Life and Faith* (A Modern Philosophy of Sex), Faber & Faber, Ltd. (1946), p. 136.
2. Ibid., p. 131.
3. Ibid., p. 137.
4. Scott, G.R., *History of Prostitution*, p. 21.
5. Ellis, Havelock, *The Psychology of Sex*, Vol. IV, p. 495.
6. Quoted by Havelock Ellis, op. cit., p. 502.

Anthony M. Ludovici draws attention to another aspect of sex-life. He says:

'The husband in a monogamic marriage consisting of the union of two positive, healthy people, finds himself on the horns of a dilemma. If he be sound and normal he cannot dream of abstaining for the number of months that would be necessary for his child's welfare . . . . But the course of modern civilization, its great blot and disfigurement, lies in the fact that at this stage in his resolve, he must perform resort to secrecy, to deception, to concealment, to a hole-and-corner liaison, which may and frequently does expose him to every conceivable danger and expense.'[1]

Luduvici frankly concludes:

'To be offended by a frankly polygamic solution and yet to feel that no stigma attaches to women unable to suckle their babies, and to be conscious of no idignation at the horrors of the present state of monogamy with prostitution, is wanton and brutal hypocrisy.'[2]

James Hinton clearly says that:

'A forced monogamy is responsible for many of the evils of prostitution and leads to hatred and quarrels, to intense jealousy in women, and to an insistence on the mere physical relationship which turns spontaneity and purity into corruption. The woman's natural jealousy is not at man's loving another, but at his forsaking her.'[3]

French sexologist, Dr. Le Bon, predicts that European legislation in future will recognise polygamy. He holds:

'A return to polygamy, the natural relationship between the sexes, would remedy many evils; prostitution, venereal diseases, abortion, the misery of illegitimate children, the misfortune of millions of unmarried women, resulting from the disproportion between the sexes, adultery and even jealousy.'

And the leading psychologist, Dr. C.G. Jung, gives testimony to the need and utility of the institution of polygamy when he says:

'The stamping out of polygamy by the African Missions has given rise to prostitution on such a scale that in Uganda alone twenty thousand pounds are spent yearly on prevention of venereal diseases, not to speak of the moral consequences which have been

1. Ludovici, Anthony M., *Woman: A Vindication* (Constable, London), pp. 165 166.
2. Ibid., pp. 175-176.
3. Quoted by Mazheruddin Siddiqi, *Women in Islam* (Institute of Islamic Culture, Lahore), p. 144.

of the worst.'[1]

It is because of these convincing arguments, weighty testimonies and scientific opinions that one is compelled to say that polygamy is not a 'disease' or a 'curse' as some turncoats think—it has great utility and performs important social functions and that is why Islam has *permitted* it.

(*iv*) Another illusion needs be dispersed. The apologists of the Report profess that polygamy is 'uncivilised' and out of tune with the modern times. Like so many other institutions of the bygone, runs their argument, it too should die a natural death and lie buried into the dust-bin of history.

This belief is a sham and an illusion.

History shows that in all periods of human civilisation, in all times and climes, polygamy has remained, and even to-day remains, an important social institution. *Encyclopaedia Britannica* bears testimony to the fact that *'as an institution polygamy exists in all parts of the world.'*[2]

M. Letourneau, in his renowned work *Evolution of Marriage*, says:

'The most civilized nations must have begun with polygamy, and *in reality, it has been thus everywhere and always.* It is a law which has few exceptions.'[3]

Professor N. W. Ingells, in his essay on 'Biology of Sex,' writes:

'Has man always been essentially monogamous or has he come up from a state often designated as promiscuous? The available evidence points to the latter. As an animal, in his sexual make-up, and in his beginnings as far as we can reconstruct them, he is anything but monogamous; and one would have great difficulty in explaining biologically such a sudden change of heart, the transition to a single wife.'[4]

Dr. Westermarck, on unimpeachable evidence, tells us that in every civilised society polygamy has prevailed. Even the Greeks recognised this institution and treated it with respect. 'The

1. Jung, Dr. C. G., *Modern Man in Search of a Soul.*
2. *Encyclopaedia Britannica*, 14th Edition, Vol. XIV, p. 949.
3. Letourneau, *The Evolution of Marriage*, p. 134.
4. Ingells, N.W., 'The Biology of Sex and the Unmarried,' in *The Sex Life of the Unmarried Adult*, Dr. Ira G. Wile (1946), p. 88.

Athenians,' writes Professor H. Licht in his monumental work *Sexual Life of the Ancient Greece*, 'recognized the polygamous tendency of man and acted accordingly.'[1]

What about the modern West whose abhorrence for polygamy is so much trumpeted? The evidence shows that the West is *de facto* polygamous.[2]

Dr. Rom Landau declares:

'But though in the West the law prohibits polygamy, "in space," it finds itself forced to condone it "in time," namely by granting divorce. A man may not have two wives simultaneously, but no one can prevent him from having ten wives over a period of years.'[3]

But it is too much to say that polygamy is prohibited 'in space.' It has assumed new channels and new forms. M. Letourneau tells us:

'We perceive that, in the present day, in countries reputed to be the most civilized, and even in the classes reputed to be the most distinguished, the majority of individuals have polygamic instincts which they find difficult to resist.'[4]

Max Nordan writes:

'Man lives in a state of polygamy in the civilized countries in spite of the monogamy enforced by law; out of a hundred thousand men there would barely be one who could swear upon his death-bed that he had never known but one single woman during his whole life.'[5]

That is why Schopenhauer asked: 'Where are real monogamists to be found?' and James Hinton frankly posed the query: 'What is the meaning of maintaining monogamy? Is there any chance of getting it, I should like to know? Do you call English life

1. Licht, H., *Sexual Life of the Ancient Greeks*, p. 59.
2. In U.S A. even a few years ago polygamy was allowed in law. Zaibunnissa Hamidullah writes in her brochure *Sixty Days in America*: 'This is understandable, you will think, since the U.S.A. is such a progressive country that the very thought of polygamy must shock them, let alone practise. When I tell you, therefore, that, until only a few years ago, polygamy was practised in America I doubt whether you will believe me. And, if I go further and inform you that a man who had, not four, but twenty-nine wives is honoured as an American prophet and has, even today millions of followers, I am sure you will feel inclined to consider me a liar' (p. 134).
3. Landau, Dr. Rom, op. cit., p. 137.
4. Letourneau, op. cit , p. 136.
5. Nordan, Max, *Conventional Lies of Our Civilization*, p. 301.

monogamous?'[1]

Statistical studies also substantiate this fact. The law has prohibited polygamy but the pre-marital and extra-matrimonial relationships of men and women clearly reveal the real state of affairs in the West. Dr. Pitirim A. Sorokin, in his thought-provoking book, *American Sex Revolution*, writes:

'Practically all studies point to an increase of promiscuity. For pre-marital activity, the statistics fluctuate between 7 and 50 per cent for women and 27 to 87 per cent for men. According to one study, pre-marital virginity declined from 65 per cent of males born before 1890 to 18 per cent of those born after 1910; and from 85 to 32 per cent of females born before 1890 and after 1910. For extra-marital liaisons, the range is from 10 to 45 per cent for husbands and from 5 to 26 per cent for wives.'[2]

Dr. Alfred Kinsey tells us that extra-marital affairs are severely rampant in the modern world. He says:

'On the basis of these active data and allowing for the cover-up that has been involved, it is probably safe to suggest that about *half of all the married males have intercourse with women other than their wives.*'[3]

He tells us that 'the human male almost invariably becomes promiscuous as soon as he becomes involved in sexual relations that are outside of the law.'[4] His studies show that the frequencies of such contacts are also very high ranging from once a week to once in two or three weeks.[5] Similarly, the frequency of the change of the partner is also extremely great—much more than what is commonly believed. His book on the *Human Female* has further substantiated this statement for the found that 40 per cent of the females are unfaithful to their husbands. Kinsey cries in astonishment: *'We did not realize the extent of such activity when the study first began.'*[6]

This is the condition in the West. It is because of this situation that the renowned lady Dr. Annie Besant said:

1. Quoted by Havelock Ellis, op. cit., p. 492.
2. Sorokin, Dr. Pitirim A., *American Sex Revolution* (Porter Sergent, Publisher, 1956), p. 13.
3. Kineay, Alfred C. and others, *Sexual Behaviour in the Human Female* (Saunders Company, 1953), p. 585.
4. Ibid., p. 589.
5. Ibid., p. 387.
6. Kinsey, Alfred C. and others, op. cit., pp. 409-445.

'There is pretended monogamy in the West, but there is really polygamy without responsibility; the mistress is cast off when the man is weary of her, and sinks gradually to be the "woman of the street," for the first lover has no responsibility for her future and she is a hundred times worse off than the sheltered wife and mother in the polygamous home. When we see thousands of miserable women who crowd the streets of western towns during the night, we must surely feel that it does not lie within western mouth to reproach Islam for polygamy. It is better for woman, happier for woman, more respectable for woman, to live in polygamy, united to one man only, with the legitimate child in her arms, and surrounded with respect, than to be seduced, cast out in the streets—perhaps with an illegitimate child outside the pale of law—unsheltered and uncared for, to become the victim of any passerby, night after night, rendered incapable of motherhood, despised by all.'

And let the last word come from Dr. Havelock Ellis who frankly says:

'It must be said that the natural prevalence of monogamy as the normal type of sexual relationship by no means excludes variations. Indeed it assumes them. The line of Nature is a curve that oscillates from side to side of the norm. Such oscillations occur in harmony with changes in environmental conditions and no doubt with pecularities of personal disposition. So long as no arbitrary and merely external attempt is made to force Nature the vital order is harmoniously maintained. The most common variation, and that which must clearly possess a biological foundation, is the tendency to polygamy, which is found at all stages of culture, even in an unrecognized and more or less promiscuous shape, in the highest civilization . . . .'[1]

'The path of social wisdom seems to lie on the one hand in making marriage relationship flexible enough to reduce to a minimum these variations—not because such deviations are intrinsically bad but because they ought not to be forced into existence—and on the other hand in according to these deviations when they occur such a measure of recognition, as will deprive them of injurious influence and enable justice to be done to all the parties concerned. We too often forget that our failure to recognize such variations merely means that we accord in such cases an illegitimate permission to perpetrate injustice. *In those parts of the world in which polygamy is recognized as a permissible variation a man is legally held to his natural obligations towards*

1. This is in line with the generally prevalent self-complacency and arrogance of the West that Ellis calls the modern civilisation as the 'highest civilisation' and it is better we skip over the remark without making any comments!

all his sexual mates and towards the children he has by those mates. In no part of the world is polygamy so prevalent as in Christendom; in no part of the world is it so easy for a man to escape the obligations incurred by polygamy. We imagine that if we refuse to recognize the fact of polygamy, we may refuse to recognize any obligations incurred by polygamy. By enabling man to escape so easily from the obligations of his polygamous relationship we encourage him, if he is unscrupulous, to enter into them; we place a premium on the immorality we loftily condemn. Our polygamy has no legal existence, and therefore its obligations can have no legal existence. The ostrich, it was once imagined, hides its head in the sand and attempts to annihilate facts by refusing to look at them; but there is only one known animal which adopts this course of action and it is called Man.'[1]

And it is this ostrich-like approach which the honourable members of the Commission want this country to adopt!

This discussion clearly shows that:

(*a*) The Qur'an places no stigma upon polygamy. It permits it and suggests it as a solution of so many of our social problems.

(*b*) The problem of surplus women can be properly solved only through this device.

(*c*) To maintain the poise of the family life it sometimes becomes essential.

(*d*) The need for a second wife can also emerge from different needs of different people. As such there must be fair opportunities of fulfilling these needs without disturbing the moral life of society.

(*e*) To check so many social evils and moral corruption, the permission for polygamy must remain.

(*f*) Practically in every society polygamy has prevailed and even in the modern West it is grossly rampant—rampant in a despicable form. Moreover, the modern thinkers are realising the narrowness of the old Christian and western approaches and are now thinking of warding off that narrowness.

(*g*) And, lastly, in the words of Muhammad Marmaduke

1. Ellis, Havelock, *The Psychology of Sex*, Vol. IV, pp 491-92, 493-94. Emphasis ours.

Muhammad Marmaduke Pickthall writes: 'Strict monogamy has never really been observed in western lands; but, for the sake of the fetish of monogamy, a countless multitude of women and their children have been sacrificed and made to suffer cruelly' (*Islamic Culture*, p. 142).

Pickthall, the conclusion that: 'Polygamy is little practised in the Muslim world to-day, but the permission remains there to witness to the truth that marriage was made for man and woman and not man and woman for marriage.'[1]

These points our discussion brings home. But the apologists of the Report may say that they did not propose to prohibit polygamy altogether. Their only endeavour is to obstruct it. Polygamy, according to their scheme, can be resorted to with the permission of the court.

Our reply is: First of all, why legal obstructions? Because you regard polygamy as a 'disease,' 'an evil' and as a product of the 'baser feelings of man.' This diagnosis is totally wrong, so is the remedy you propose!

Secondly, this legal restriction is an encroachment upon the fundamental liberties of man and assigns to law a function which neither is its field, nor is it capable of performing.

Thirdly, it negatives the principle of respect of human dignity to a great extent.

Lastly, it is unnatural and will result in producing all those evils which emerge from enforced monogamy. That is why expert opinion everywhere is predominantly against this restriction. Let us refer to a few.

Havelock Ellis, while repudiating the idea of enforcing monogamy by law declares: '. . . in attempting to regulate the sexual relationships of its members the State attempts an impossible task and is at the same time guilty of an impertinence.' He holds that there should be no such *legal restriction* on polygamy.

James Hinton says: 'Monogamy may be good, even the only good order, if of free choice; but a law for it is another thing.'

Dr. E. D. Cope writes in *The Marriage Problem:* 'the best way to deal with polygamy is to let it alone.'

Mr. Southern declares that he sees no reason why 'the state should enforce it.' So far as other forms of marriage, he asserts, can be practised by mutual consent, and without detrimentally affecting children, the state hasn't the ghost of a right to veto them.

1. Pickthall, M. M., *Islamic Culture*, p. 145.

Dr. Norman Haik pleads for legalised polygamy and says that it will offer many advantages to the majority of people. Professor Dunlop thinks it may well be that certain individuals cannot attain complete satisfaction in monogamy, but may attain a highly satisfying adaptation in polygamous marriage, and that the system of the future will leave individuals free to form whatever type of matrimonial alliances are most advantageous to them.

Dr. Le Bon of France also pleads for legislation of polygamy and predicts that 'European legislation in future will recognize polygamy.'[1]

This is the trend of healthy modern thought. But our 'progressive reformers' have no heart for reason or argument. They are charged with the ambition of playing the Ataturk!

4. THE REPORT AND IQBAL

THE members of the Commission have tried to exploit the name of Iqbal again and again. Perhaps they want to give the impression that their Report is nothing but a representation of the views of 'Allama Iqbal. They have tried to paint Iqbal as a 'liberal thinker' who wanted to tear asunder the entire fabric of orthodoxy and to make a gate-crash into the modern world by revolting against the traditions of the *Millat*. They have tried to present Iqbal as the upholder of unrestricted and uncontrolled *Ijtihād*, as a severe critic of Muslim *Fiqh* and as a staunch opponent of *taqlīd*.

After reading the Report one is left with the impression that Iqbal is perhaps one of the worst victims of literary genocide and intellectual libel and calumny. Everybody is trying to exploit his name. Intellectual perverts are trying to present their senseless fulminations on the 'authority' of Iqbal and, worst of all, this official Report has also misused his name and authority and is guilty of grossly misrepresenting him.

Iqbal was a leading Muslim philosopher of this age. He was a revivalist thinker and infused a new spirit in the world of Islam.

1. These references have been taken from Havelock Ellis, *Psychology of Sex*, Dr. Westermarck, *Future of Marriage in the Western Civilization* and M. Mazheruddin Siddiqi, *Women in Islam*.

One may disagree with Iqbal on this point or that, but no one can deny his significant contribution to the renaissance of Islam in the twentieth century. Puny writers always try to use the names of leading thinkers as advertisements for their own ideas—but it is sheer dishonesty to mutilate and distort another person's views and to exploit his name for the propagation of the very ideas which he severely opposed. And, unfortunately, the Report has failed to put up a high standard in this respect.

They quote Iqbal as saying: 'The question which is likely to confront Muslim countries in the near future, is whether the Law of Islam is capable of evolution—a question which will require great intellectual effort, and is sure to be answered in the affirmative; provided the world of Islam approaches it in the spirit of Omar—the first critical and independent mind in Islam who, at the last moments of the Prophet, had the moral courage to utter these remarkable words: "The Book of God is sufficient for us."' These lines occur on page 162 of Iqbal's *Reconstruction of Religious Thought in Islam*. But this is only a fragment of the view that Iqbal expressed. These sentences have been torn from their context. The lines that follow this sentence sound a note of caution, but the Commission thought it advisable—for reasons best known to themselves—to scrupulously omit those lines and give only a partial view to the reader. What Iqbal has to say after that 'plea for liberalism' is worth reading. He says:

'We heartily welcome the liberal movement in modern Islam; but it must also be admitted that *the appearance of liberal ideas in Islam constitutes also the most critical moment in the history of Islam. Liberalism has a tendency to act as a force of disintegration*, and the race-idea which appears to be working in modern Islam with greater force than ever may ultimately wipe off the broad human outlook which Muslim people have imbibed from their religion. *Further, our religious and political reformers in their zeal for liberalism may overstep the proper limits of reform in the absence of a check on their youthful fervour*. We are today passing through a period similar to that of the Protestant revolution in Europe, and the lesson which the rise and outcome of Luther's movement teaches should not be lost on us. A careful reading of history shows that the Reformation was essentially a political movement, and the net result of it in Europe was a gradual displacement of the universal ethics of Christianity by a system of national ethics. The result of this tendency we have seen with our own eyes in the

Great European War which, far from bringing any workable synthesis of the two opposing systems of ethics, *has made the European situation still more intolerable.* It is the duty of the leaders of the world of Islam today to understand the real meaning of *what has happened in Europe, and then to move forward with self control and a clear insight into the ultimate aims of Islam as a social policy.*'[1]

Iqbal further says:

'Only we should not forget that life is not change, pure and simple. It has within it elements of conservation also. While enjoying his creative activity, and always focussing his energies on the discovery of new vistas of life, man has a feeling of uneasiness in the presence of his own unfoldment. In his forward movement he cannot help looking back to his past, and faces his own inward expansion with a certain amount of fear. The spirit of man in its forward movement is restrained by forces which seem to be working in the opposite direction. This is only another way of saying that life moves with the weight of its own past on its back, and that in any view of social change the value and function of the forces of conservatism cannot be lost sight of. *It is with this organic insight into the essential teaching of the Quran that modern Rationalism ought to approach our existing institutions. No people can afford to reject their past entirely; for it is their past that has made their personal identity. And in a society like Islam the problem of a revision of old institutions becomes still more delicate, and the responsiblity of the reformer assumes a far more serious aspect.* Islam is non-territorial in its character, and its aim is to furnish a model for the final combination of humanity by drawing its adherents from a variety of mutually repellent races, and then transforming this atomic aggregate into a people possessing a self-consciousness of their own. This was not an easy task to accomplish. Islam, by means of its well-conceived institutions, has succeeded to a very great extent in creating something like a collective will and conscience in this heterogeneous mass. *In the evolution of such a society even the immutability of socially harmless rules relating to eating and drinking, purity or impurity, has a life-value of its own, inasmuch as it tends to give such society a specific inwardness, and further secures that external and internal uniformity which counteracts the forces of heterogeneity always latent in a society of a composite character.* The critic of these institutions must therefore try to secure, before he undertakes to handle them, a clear insight into the ultimate significance of the social experiment embodied in Islam. He must look at their structure, not

1. Iqbal, Dr. Muhammad, *The Reconstruction of Religious Thought in Islam* (Shaikh Muhammad Ashraf, Lahore, 1954), pp. 162-163.

from the standpoint of social advantage to this or that country, but from the point of view of the larger purpose which is being gradually worked out in the life of mankind as a whole.'[1]

Before concluding this *Lecture*, Iqbal further voices a note of caution:

'Humanity needs three things today—a spiritual interpretation of the universe, spiritual emancipation of the individual, and basic principles of a universal import directing the evolution of human society on a spiritual basis. Modern Europe has, no doubt, built idealistic systems on these lines, but experience shows that truth revealed through pure reason is incapable of bringing that fire of living conviction which personal revelation alone can bring. This is the reason why pure thought has so little influenced men while religion has always elevated individuals, and transformed whole societies. The idealism of Europe never became a living factor in their life, and the result is a perverted ego seeking itself through mutually intolerant democracies whose sole function is to exploit the poor in the interest of the rich. *Believe me, Europe today is the greatest hindrance in the way of man's ethical advancement. The Muslim, on the other hand, is in possession of those ultimate ideas on the basis of a revelation, which, speaking from the inmost depths of life, internalizes its own apparent externality.*'[2]

Iqbal has welcomed modern Islam's—particularly Turkey's—urge to move ahead and explore new vistas of progress. But about the views of Zia Gokalp and the interpretations of the modern rationalists he says:

'For reasons which will appear later the poets' Ijtihad is open to grave objections.'[3]

'With regard to the Turkish poet's Ijtihad, I am afraid he does not seem to know much about the family law of Islam. Nor does he seem to understand the economic significance of the Quranic rule of inheritance.'[4]

About their nationalism and secularism he declares:

'The truth is that the Turkish Nationalists assimilated the idea of the separation of the Church and the State from the history of European political ideas.'[5]

These views he expressed in his lectures which were delivered

1. Iqbal, *Reconstruction*, pp. 166-167.
2. Ibid., p. 179.
3. Ibid., pp. 160-161.
4. Ibid., p. 169.
5. Ibid., p. 155; emphasis ours.

in 1928 when the Turkish experiment was still in the offing and all its results had not fructified. During later days he was disappointed with the unbridled liberalism of the Turks about whom even in 1928 he had said:

'And if we cannot make any original contribution to the general thought of Islam, *we may, by healthy conservative criticism, serve at least to check the rapid movement of liberalism in the world of Islam.*'[1]

But in *Ḍarb-e-Kalīm* which was published in 1936 he clearly expresses his disappointment with Kemalism. He says:

میری نوا سے گریبان لالہ چاک ہوا
نسیم صبح چمن کی تلاش میں ہے ابھی
نہ مصطفے نہ رضا شاہ میں نمود اس کی
کہ روح شرق بدن کی تلاش میں ہے ابھی

[My speech has torn the robe of flowers
But still the morning breeze is in search of the Garden!
Neither has it appeared in Muṣṭafa Kemāl nor in Raḍa Shah,
The spirit of the East is still searching its abode!][2]

Thus it would be wrong to say that Iqbal's views can lend any support to the destructive liberalism of the members of the Commission.

More light is thrown upon the problem, when one studies Iqbal's *Rumūz-e-Bekhudī* wherein he extensively dwells upon the importance of Traditions, and even *taqlīd*. He says:

ملت از تقلید مے گیرد ثبات　　مضمحل گردد چو تقویم حیات
معنیٔ تقلید ضبط ملت است　　راہ آبا رو کہ ایں جمعیت است

[When the structure of life begins to decay
The nation takes strength from *Taqlīd*.
Go thou the way of thy forefathers for therein lies strength,
The purpose of *taqlīd* is the maintenance of the nation.]

He further says:

اے پریشان محفل دیرینہ ات　　مرد شمع زندگی در سینہ ات
نقش بر دل معنیٔ توحید کن　　چارہ کار خود از تقلید کن

[O thou! whose old concourse is dispersed,
Within whose breast the lamp of life is out,
Engrave on thy heart the truth of *Tauhīd*
Solve thy problem by resorting to *taqlīd*.]

1. Iqbal, *Reconstruction*, p. 153.
2. Iqbal, *Ḍarb-e-Kalīm* (1954), p. 144.

Iqbal then goes on to tell us that:

اجتہاد اندر زمان انحطاط　　قوم را برہم ہمی پیچد بساط
زاجتہاد عالمان کم نظر　　اقتدا بر رفتگاں محفوظ تر
عقل ابایت ہوس فرسودہ نیست　　کار پاکاں از غرض آلودہ نیست
فکر شاں ریسد ہمے باریک تر　　ورع شاں با مصطفے نزدیک تر

[In the time of Decadence *Ijtihād* completes the people's disintegration;
It is safer to follow those who have gone forth
Than the *Ijtihād* of the claimants to knowledge who are short-sighted;
Caprice corrupted not the wisdom of thy forefathers,
Nor was the labour of the pious soiled by personal motives;
Finer was the thread of thought, their meditation wove,
Close to the Prophet's way was their 'piety.']

In another chapter of the *Rumūz-i-Bekhudī*, Iqbal emphasises the importance of history and traditions and regards the 'perpetuation of the national traditions' as an indispensable condition for Islamic revival. He says:

نسخہ بود ترا اے ہوشمند　　ربط ایام آمدہ شیرازہ بند
ربط ایام است ما را پیرہن　　سوزش حفظ روایات کہن

[The prescription of thy life, O the wise one!
Is the connecting thread of the past
That stitches life's scattered leaves;
Harmony with the past is apparel for us.]

And that:

مشکن ار خواہی حیات لا زوال　　رشتۂ ماضی ز استقبال و حال
موج ادراک تسلسل زندگی است　　مے کشان را آشور قلقل زندگی است

[If thou desirest life everlasting
Break not the relation of the Past with the Future and the Present;
Life is naught but a wave of the consciousness of continuity,
For the revellers the echo of pouring wine is life.]

These are the views of Iqbal. He opposed uncritical conservatism as well as uncontrolled liberalism. It is a great injustice to Iqbal to present him in a manner as if he were a supporter of the *neo-Mu'tazilites* of our country. It is the minimum demand of honesty that we should present Iqbal as he was, and not what the *neo-Mu'tazilites* or, for the matter of that, any particular group would like him to be.

5. THE CORRECT APPROACH

It is our considered opinion that prime importance should be given to the proper emancipation of our women-folk. But this emancipation must be on the lines envisaged by Islam and not in the emulation of the West. Pickthall rightly said :

'When Muslims think of feminine emancipation, the Islamic ideal must always be kept in sight, or they will go astray after something which can be no guide to them.'[1]

It is the duty of the Muslim society to break the shackles of cultural servitude and carve out its own destiny. We have to fight the western and other alien influences and revive the pristine purity of Islam.

In this respect the legal structure should be overhauled in the light of the Islamic *Sharī'ah* and legal injunctions of the Qur'ān and the *Sunnah* should be given proper enactment.

Mere legal reforms cannot deliver the goods. As such customs and social and cultural traditions should be moulded into the pattern of Islam. Everything cannot be done by the iron rod of law. Customs and conventions play a mighty part in the life of a society and our best endeavours should be devoted to a peaceful and gradual social reform.

Women's education is another important problem that awaits our attention. They should be educated and educated to grow into ideal Muslim women. Family is the cradle of civilisation and mother is the pivot of the family institution. Her education is most essential for the reform of the family and for the proper development of the new generations.

Extension of women's social activities within the limits of *purdah* is also essential. Establishment of *women's parks, zanana clubs* and such other institutions is a great need of our society.

Proper and efficient machinery for the settlement of matrimonial disputes and an unabridged guarantee and sure arrangements for the implementation of the judicial rights of women should be made.

In an Islamic society the mind and character of the people is built with the help of education, propaganda and persuasion,

1. Pickthall, M. M., *Islamic Culture*, p. 148.

through social customs and conventions, and when there is any violation of justice, the law is there to redress it. And this is the most effective way of solving the social problems—other methods do not eradicate the evil, they merely direct it into some other channels.

Had this approach[1] been adopted by the honourable members of the Commission they would have done a great service to this country. But unfortunately they adopted the other method. And the result is clear: confusion without gain, labour without prize.

1. We have discussed this approach in a little detail in our Introduction.

Appendix

A CRITICAL ANALYSIS OF THE MARRIAGE COMMISSION REPORT

By

PRINCESS ABIDA SULTANA

The publication of the Marriage Commission Report gave rise to a lively debate. All sections of public opinion took part in the controversy: some people applauded it like a new gospel, some others criticised it and condemned it with all the vehemence and indignation at their command. Princess Abida Sultana, Pakistan's former Ambasadress to Brazil, also took a keen interest in the debate and criticised the Report on its heresies. Her criticism was published in Daily *Dawn*, Karachi, and *Morning News*, Karachi. It was subsequently reproduced by a large number of English and vernacular papers of Pakistan. We too are reproducing her article and its supplement in this appendix so that the views of the learned lady may be known to a wider public.—*Editor*.

'O you who believe! when you confer together in private do not give to each other counsel of sin and revolt and disobedience to the Apostle, and give to each other connsel of goodness and guarding against evil; and be careful of your duty to Allah, to Whom you shall be gathered together'—al-Mujādilah.

THE state is the custodian of social justice.' (M. C. Report).

Yes; but not at the expense of the ideology that established its independence.

It cannot be ignored that, unlike other countries, Pakistan owes its separate existence entirely to Islam; therefore the primary duty of this state is to preserve, defend and uphold, in preference to all else, that distinctive ideology which established Pakistan.

'The actual state of the socio-economic pattern has changed considerably since the early centuries of Islam'—(M. C. Report).

Therefore the justification for inventing 'new applications' for the 'out-moded examples' and interpretations expounded by our Prophet.

Nevertheless, these 'new applications' could have merited consideration, had they been confined to only such parts of our state legislations as do not adequately safeguard our divine rights, and had not attempted to interfere and mutilate the implications of the Quran and Sunnah itself.

But our modern reformers would have us believe that the passage of time entitles and qualifies anyone to officiate for the Prophet:

'Have ye any hope that they will be true to you when a party of them used to listen to the Word of Allah, then used to change it, after they had understood it knowingly? And when they fall in with those who believe, they say: We believe. But when they go apart one with another they say: Prate ye to them of that which Allah hath disclosed to you that they may contend with you before Lord concerning it? Have ye then no sense? Are they then unaware that Allah knoweth that which they hide and that which they proclaim? Among them are unlettered folk who know the Scripture not except from hearsay. They but guess.'

It has also been conveniently forgotten that Islam does not permit compulsion.

We are not Muslims through law and legislations of the state, neither are we Muslims by virtue of Pakistan; on the contrary, Pakistan is by virtue of us. Therefore, we have not accepted our

faith through state legislations, cannot be forced to accept subsequent mutilations through state laws, either.

The beauty of our faith lies in the freedom God grants us of accepting Islam or of following some other religion. While He Himself chooses, prefers and recommends it as the 'final,' 'complete' and 'perfect' code of life, yet in His infinite Mercy He still permits us to retain the freedom of our choice: there is no compulsion in faith. Unto you your religion, unto me my religion.

Who then claims greater authority than God to bind us down with legislations repugnant to these divine revelations, and calls it Islam?

In our struggle and voluntary sacrifices for the independence of Pakistan, we were not merely concerned in safeguarding the places and forms of Muslim worship that are fairly well-protected by non-Muslim governments nearly all over the world.

Our sufferings were to preserve, safeguard and practise the entire social, economic and moral system of Islam—which alone can justify the separation of Pakistan.

Neither had we intended to forfeit our established concepts of 1,400 years, in exchange for a modern 'ism' recommended and introduced by a group of people whose knowledge of Islam, and respect for the Prophet, is amply reflected in their statements.

This Commission threatens to deprive us of several of those divine rights known as Huqúqul Ibad which are bestowed upon us as Musalmans. The first is: There is no compulsion in religion. The second is the distinctive status and rights enjoyed by both sexes which are to be replaced by the so-called 'equality' for women, even though this 'substitution' may prove fatal and degrading for them. The third is the right of divorce. The fourth is the right of polygamy. [The Quranic verse:]

'Men are in charge of women, because Allah hath made the one of them to excel the other, and because they spend of their property (for the support of women). So good women are the obedient, guarding in secret that which Allah hath guarded. And those from whom ye fear rebellion, admonish them and banish them to beds apart, and scourge them. Then if they obey you, seek not a way against them. Lo! Allah is ever High, Exalted, Great'—*al-Nisa*

clarifies and dignifies the status of man by virtue of the sacred

obligation placed upon him of earning and providing for the women and children.

The greatest slavery, the greatest bondage, the greatest source of humiliation and exploitation that exists for both sexes in every form of ancient and modern society is 'economic dependence.'

No human intelligence could have protected and elevated women with such equity and beauty, as does Islam.

By ensuring 'her' economic independence, her status has been raised above that of man. While man by divine law has been 'compelled' to accept responsibilities which he would never have done otherwise.

SHE is entitled to:

(*a*) Inheritance from her own family, plus

(*b*) Inheritance from her husband, plus

(*c*) Meher, plus

(*d*) Nan-nafqa, plus

(*e*) No financial obligations towards herself, her parents, her husband, her children, and her domestic expenses, plus

(*f*) While 'she' has access to the husband's property during his lifetime, he cannot touch hers as long as she lives, plus

(*g*) Her matrimonial independence protected by her giving or withholding her consent to the Nikah, plus

(*h*) Her right for 'Khula' plus

(*i*) The rights of both sexes, of having equal freedom, to introduce in their marriage contract such other stipulations which may be special to their individual requirements.

How and where can anyone dare to challenge or improve upon Islam?

By the same process of socio-economic logic, through which divorce and polygamy are being attacked, man can, and will, demand legislation to force the surrender of those divine rights which entitle women to 'Meher,' 'Nan-Nafqa' and properties from both sides (her husband and her parents). They will also be required to pay 50 per cent of the domestic and family expenses as their share of equality.

Neither will the mischief confine itself to matrimonial and social laws, it will invade every corner and concept of Islam by

setting the regrettable example of misinformed religious and political amateurs mutilating and misrepresening Islam under the protection of a Muslim Government.

A year earlier, I made a sincere appeal to Muslims in general and women in particular not to allow their emotions to betray the faith they profess and realize the very serious consequences that would arise out of remaining happily indifferent to the impulsive outbursts of westernized feminists who had naively singled out the ex Prime Minister, Mr. Mohammad Ali, as a target for their agitation.

But people were so amused at his embarrassment, and so near-sighted in regard to the consequences of utilizing this unfortunate method as an additional handle to hasten his imminent overthrow that the danger to their own Faith was either completely overlooked or underestimated.

To-day we reap the harvest of that short-sighted indifference. And if the same lethargic, half-heartedness continues, to-morrow will be too late.

'The basic principles of human relations as enunciated by the Holy Book are valid for all times, but the "applications" must vary along with the changing circumstances' (M. C. Report).

This statement will remain vague and self-contradictory until we analyse the details of the contemplated changes.

'The law and procedure, about marriage, divorce, and guardianship of the person and property of the minors, and inheritance need overhauling to create greater security and stability in family relation and to help the helpless' (M.C. Report).

Beautifully vague!

Nevertheless, if by 'laws and procedure' the reference is to Quranic laws and the Sunnah, it amounts to heresy.

Such statements qualify the authors to being disowned from Islam and Pakistan, unless they clarify and withdraw even the suspicion of a reflection on the Quran and Sunnah.

'The interpretations of the revered jurists have to be studied again, in the light of expanding human knowledge, and widening experience and reconstruction in the light of the spirit of the *Qur'ān*, is not only permissible but is a duty imposed on the Muslims to make Muslim society adaptive, dynamic and progressive' (M C. Report).

But instead of confining itself to modifying such current

state legislation as do not adequately safeguard our divine rights, the Marriage Commission has directly misrepresented the Quran and Sunnah.

The Quran and the Prophet confirm and expound one another. They cannot be separated and treated as different.

Principles are laid down by the Quran, and their 'practical implementation' or 'application' are provided by the Prophet.

Conversely, the 'applications' of the Prophet are endorsed by the Quran. These are the only two sources which enjoy divine authority and sanction.

Therefore, anyone attempting to change or modify Mohammad's applications must first prove his or her divine sanction to such interference.

The position of accepted and authentic jurists is quite different and merely explanatory. A reference to their opinions only arises when by the Quran or the Sunnah, no definite guidance is available.

No authentic jurist has ever claimed his opinion to be the gospel truth binding upon such Muslims who do not accept it voluntarily. Neither do they enjoy any special status, protection or mandate from God.

None have dared to suggest that the passage of time qualified them to modify or overrule the Prophet's applications. They universally recognize that what emphasizes and proves the finality of Islam is its 'protection.'

What proves the finality of the last divine revelation, i.e. the Quran, is its 'perfection.'

What elevates the status of 'Mohammad' above all God's creations, and proves his finality, is his 'perfection.'

And finality and perfection do not admit 'improvement.'

Yet, the recommendations of the Marriage Commission are to be binding upon us.

This seems to resemble Christian practices more than Islam where the Pope, or the religious head, is said to enjoy mandatory powers of modifying or changing their concepts to suit the requirements of the times.

By imitating the Pope's authority in Islam, our modern reformers not only lead us to suspect that their superfluous

knowledge of Islam is limited by English literature available to them (which has only been able to look at it through Christian eyes), but that they have also decided to convert us into Christian Muslims!

There already exist numerous theories of how 'Riba' becomes permissible, and 'Zakat' not payable because it is already deducted through Government taxes. 'Roza' was recently proved 'optional' by an Egyptian; and as for 'Namaz,' the 'Quran' nowhere mentions the form in which it should be performed. What a lot of national time would be saved if one could receive a 'dispensation' that the physical exercises performed 1,400 years ago by Mohammad have been out-moded by the 'changing times'; and by merely having the 'Niyat' (intention) one could claim to be performing 'Namaz' while one was working a factory machine, or Waltzing to a 'heavenly Inspiration' from Strausse.

Is it not unfortunate that when lesser values are at stake, the people and the press unite in shouting 'Islam, Islam, Islam,' but when Islam itself is ridiculed, people remain blissfully unaffected?

Shame on our 'Ulama' who as custodians of our religious knowledge, remain calmly indifferent.

Shame on the Muslim nation who does not have the pride or loyalty to safeguard its Faith and convictions.

And shame on the women who not having the intelligence and capacity to appreciate and enforce their divine rights, will go down in history as originators of such mutilations.

'Special diseases require special remedies' (M. C. Report).

But the criterion by which the 'special diseases' are being 'judged' are more western in character and contrary to the moral standards enjoined by Islam.

For instance, Islam condemns adultery and other sexual crimes with a severity which is indicated by the extreme punishment of death, while Dr. Geoffrey Fisher, the Archbishop of Canterbury, was quoted by the Press as having said: 'Forgiveness of adultery is far preferable to divorce.'

Does this not clearly indicate what is preferable in western society is severely condemned by Islam? Which is diseased, Islam or adultery?

'If anything that was permitted in Islam,—because human society was yet in its early "stages– etc." ' (M. C. Report).

Despite the thousands of years that passed between Adam, the first Prophet, and Mohammad, the last Prophet, the many civilizations that reached their zenith and became extinct, and the number of Prophets that came to preach and improve human conditions, society remained in its early stages, but in less than 10 years, i.e. from the establishment of Pakistan to now, human society has out-lived the Prophet's applications!

By simpler arithmetic, one would have expected that Islam being the final improvement over a period of so many thousands of years, it would survive to the end of the world. At least this has been one of our convictions.

However the wisdom of the M.C. dictates otherwise :

'If anything permitted by Islam, not enjoined, has resulted in the abuse of a permission, the permission is to be hedged in' (M.C. Report).

It is a universally accepted law and practice that the right of withdrawal is vested in the granting authority, and not in the grantees.

One may voluntarily surrender one's personal privilege, but one may not, and cannot, force others to surrender these as well.

Men may individually surrender their right to polygamy, by either accepting this as a condition of their matrimonial contract, or may not exercise it voluntarily just as thousands of women surrender their 'Meher' voluntarily. But no Muslim state can make legislations to force a general surrender of our individual rights granted by God. Not even the Prophet aspired to attempt this!

An incident which confirms this point of view is as follows :

By the time Hazrat Omar assumed the Khilafat, Arab women had raised their 'Meher' and 'Nan-Nafqa' to such an extent, that men generally complained and agitated against the 'abuse of this permission.' And Hazrat Omar decided to 'hedge it in.'

After a Juma' prayer, he spoke to the people deploring the abuse women had made of their rights, and declared his intention of limiting the Meher to that of 'Azwaj-i-Muttahharat.' He pointed out that since they took precedence over all Muslim women, no

woman would henceforth be entitled to a Meher greater than theirs.

When he finished speaking he asked the people if they had any suggestions to offer. Silence prevailed.

Presently the stern voice of an old lady was heard. 'Omar,' she demanded, 'our Prophet has departed from amongst us without fixing these limits which we have been granted by the Quran; are you trying to suggest that you have greater authority and wisdom than God and the Prophet, to deprive us of them?'

Omar sat down holding his head in both his hands. Weeping and throwing dust upon his head, he said, 'Woe upon Omar, the Khalifat-ul Muslimeen whose intelligence and logic has been proved inferior to that of an old woman!'

The amount of Meher has remained unrestricted to this day!

This is the Islam we knew prior to Pakistan, and this is the spirit we struggled for; not the poppycock that emanates from the Marriage Commission.

Meher, registration, etc.

This is a minor detail, and does not appear to conflict with any principle and therefore needs no discussion, except that it seems to have heen overlooked, that it is far easier to obtain signatures from illiterates on false pretexts, than it is to obtain their oral acceptance and evidence. Also it is equally easier for an illiterate to pretend ignorance of what is written in his signed document.

With about 16 per cent literacy in Pakistan, this suggestion seems premature, unless oral and written evidences are combined together.

For divorce, however, this stipulation of the Commission will be impossible. Divorce being the arbitrary right of the man, it will unnecessarily expose women to being insulted hundred times a day, by oral divorces being hurled at them, and the written confirmation withheld indefinitely.

Under the heading of polygamy, the Commission has taken up two columns in justifying their recommendation of:

The establishment of Matrimonial Courts.

Restrictions on Polygamy.

Restrictions on divorce.

Matrimonial courts

These would be extremely beneficial provided their authority was restricted to the conditions of the Quran and Sunnah, but not if they are to exercise the extraneous powers the Marriage Commission wishes to bestow upon them.

'The Quranic permission was a conditional permission to meet "gross social emergencies"' (M.C. Report).

The Quranic permission is not 'WAS.' It is 'IS.'

One would also be infinitely grateful, if a single Aayat or authentic Hadis could be quoted in support of this claim that polygamy is subject to 'grave social emergencies,' or subject to defects in wives which need to be established in courts before it may be permitted.

Last year, as an answer to my reference to polygamy, the Press reported 'indignation' and 'condemnation' by the League of Rights of Women and quoted two verses of the Quran.

In the first place indignation, condemnation, and bringing down sacred principles to personal levels is no answer to accepted facts and logic.

Secondly, verse 2 of Surah Nisa as quoted by the League is irrelevant, its reference being to the rights of orphans which was not the subject under discussion.

Verse 3, however, is relevant to polygamy but its significance to my submission is not evident. Because it can always be verified from my Press statement that I had not, and would dare not, attempt to disguise it. I quote from my previous reference: 'What, however, has clearly been stipulated is equal treatment among wives, etc.' Therefore verse 3 and my submissions were identical.

Nevertheless, it was amusing to discover the confusion and logic of the League as indicated by their answer.

To-day I repeat with greater emphasis every word of what I have previously said and add:

That no human being has the opportunity or capacity to know beforehand whether the intention of a husband is to exercise equality or not, until after he has married again and proved that he does not adhere to the principle.

While there are some people who do not pay attention to equality, there are others who definitely do. And there are

instances of women who prefer to go into 'cold storage' in order to retain the moral, financial or social protection they enjoy from the husband, which also receive the approval of the Quran: Hazrat Soda was one who surrendered her sexual relationship in favour of Hazrat Ayesha, but still remained the Prophet's wife.

Rather than being grateful for having this added protection, especially for unwanted Eastern wives past the age of 40, men are being left with no alternative but to divorce (which will again be subject to permission from the court) or commit adultery spending ten times as much on 'keeeping' a mistress who only enjoyed the frivolous moments of his life without having any responsibilities or share in his problems, and contributes nothing but illegitimate children and degradation to society.

The nation collectively pays for these illegitimate children while parents enjoy adultery, and this is called 'dynamic, expanding social economy.'

Happily, Islam does not place a collective responsibility on the nation for the misdeeds of the individual. And if I were to discuss the laws of inheritance, and 'illegitimate legitimacy' as compared with Islam it would need a whole book.

Multiplicity of wives

If, and when, we, the Muslims, accept that our revered Prophet is the best and most authentic interpreter of our Faith, his example of the multiplicity of wives, coupled with no restrictions on his followers to do the same, should be more than enough to prove that the Quranic permission was not given to be withdrawn.

The same is proved by the Quranic verse:

'Ye will not be able to deal equally between (your) wives, however much ye wish (to do so). But turn not altogether away (from one), leaving her as in suspense. If ye do good and keep from evil, lo! Allah is ever Forgiving, Merciful.'—*An Nisa*

which informs us that we shall not be able to exercise full justice and equality, even if we tried hard to do so, but does not conclude by withdrawing or prohibiting the permission. It concludes by saying:

'But turn not altogether away (from one), leaving her as in suspense.'

Elsewhere, the Quran gives the details of what is prohibited in marriage.

'Forbidden unto you are your mothers, and your daughters, and your sisters, and your father's sisters, and your mother's sisters, and your brother's daughters and your sister's daughters and your forster-mothers and your foster-sisters and your mothers-in-law, and your step-daughters who are under protection (born) of your women unto whom ye have gone in—but if you have not gone in unto them, then it is no sin for you (to marry their daughters)—and the wives of your sons who (spring) from your own loins. And (it is forbidden unto you) that ye should have two sisters together, except what hath already happened (of that nature) in the past. Lo! Allah is ever Forgiving, Merciful'—*An Nisa.*

And concludes by:

'And all married women are forbidden unto you save those (captives) whom your right hands possess. It is a decree of Allah unto you. Lawful unto you are all beyond those mentioned, so that ye seek them with your wealth in honest wedlock, not debauchery'—*An Nisa.*

Please note the scope of this freedom.

There is not even a hint of 'grave social emergencies' or defects in the first wife, which is a pure invention.

If defects in the first wife are to be proved to matrimonial courts the permission for four wives automatically would be reduced to two. Why are four allowed?

'It is thoroughly irrational to allow individuals to enter into second marriages whenever they please, and then demand poste facto . . . remedies' (M.C. Report).

Here again the M.C. seems to pre-suppose, and restrict the permission from four to two wives, although they have cleverly avoided clearly stating this.

However, would it be thoroughly rational to say, that because the tendency towards corruption and immorality is widely prevalent in Pakistan all the 80 million citizens should be condemned as criminals by state legislations and sent to jail before they have the opportunity of committing further crimes? It would nip a greater social evil in the sense that polygamy is perhaps practised by less than two per cent of our population, while other corruptions are far more general and widespread.

Divorce

The Commission wishes it to be enacted that a divorce will not be permissible without the intervention of the court.

There are undoubtedly verses in the Quran which clearly

recommend and prefer the intervention of third parties to attempt reconciliation rather than divorce.

But then again this cannot be subjected to the permission of the court. On what grounds will the court judge when the Quran says:

'O ye who believe! If ye wed believing women and divorce them before ye have touched them, then there is no period that ye should reckon. But content them and release them handsomely'– *Al Ahzab*

'It is no sin for you if you divorce women while yet ye have not touched them, nor appointed unto them a portion. Provide for them, the rich according to his means, and the straitened according to his means, a fair provision. (This is) a bounden duty for those who do good'—*Al Baqarah*

which gives unrestricted freedom to divorce even before the marriage has been consummated and any knowledge of the suitability or otherwise of the wife does come into consideration.

'And if ye wish to exchange one wife for another and ye have given unto one of them a sum of money (however great), take nothing from it. Would ye take it by the way of calumny and open wrong?'—*An Nisa.*

This verse also does not imply that justification for changing one wife for another is desired before one can do so. All these ideas have been transplanted from the West. And if these ideals are preferable, why mutilate Islam? Why not accept the faith or ideology which affords the opportunities desired?

It is not the duty and sacred obligation of every Muslim and non-Muslim to defend the faith he or she professes? May I, therefore, strongly urge those of us who feel our faith and concepts are being tampered with and exposed to ridicule to unite and organize themselves to defend what we have hitherto understood and accepted.

My humble efforts will unconditionally remain at the disposal of those who wish to utilise them for 'truth.' God is on our side.

'O ye who believe! Be ye staunch in justice, witnesses for Allah, even though it be against yourselves or (your) parents or (your) kindred, whether (the case be of) a rich man or a poor man, for Allah is nearer unto both (than ye are). So follow not passion lest ye lapse (from truth) and if ye lapse or fall away, lo! Allah is ever informed of what ye do'—*An Nisa.*

(*Reproduced from Daily* Dawn, *Karachi*, 5 *August* 1956.)

II. POSTSCRIPT[1]

Sir, since my article on the M.C. Report appeared in your esteemed paper of August 5, 1956, several letters of appreciation and criticism have also appeared in connection with it. Others have been privately addressed to me. As their number exceeds my capacity to reply to each one separately, I request the courtesy of your paper to offer my very grateful thanks for the compliments and tributes so generously showered upon me.

The highest tribute, however, is due to Maulana Ehtishamul-Huq Saheb, for the precise, forthright and courageous manner in which he has dealt with each point in detail, and has guided us Muslims, as to what our correct attitude should be in matters relating to Islam. Our highest esteem and gratitude is, therefore, due to him.

To my critics I suggest a reference to Maulana Saheb's views on the Report. They will find that all my arguments have been most vigorously and forcefully endorsed by him.

I also notice, from the various cirticisms, that the issues raised by me have been consciously or unconsciously confused by some.

Point No. 1 is: whether I have opposed the idea of reforms being necessary in the existing State Marriage Laws, either because I am of the opinion that there is no abuse of the permissions granted by Islam or because I maintain that the present State Laws adequately protect the rights of women.

I am not conscious of a single word of protest, complaint or criticism, having been raised by me against the *need* of such reforms, nor have I ever suggested that this issue should be deferred to some future indefinite period nor have I implied that abuses do not exist and do not need to be redressed adequately.

Taking my article as a whole, an unbiased reader cannot but admit, that my protest is not against reforms, my protest, throughout, has been consistently against the proposals which to my mind contain un-Islamic reforms.

In col. 1, para 7 of the said article, I say:

1. Being a letter written to the Editor of *Dawn*, and published in its issue dated 19 September 1959.

'These applications would have suited consideration, had they been confined to such parts of our State Legislation, as do not adequately safeguard our Divine Rights, and had they not attempted to mutilate and interfere with the implications of the Quran and the Sunnah.'

Further on, in the same article, I agreed with the setting up of Matrimonial Courts, with the provision that they exercise their authority according to the tenets of Islam, and were not given extraneous powers, as suggested by the Commission.

It short, the theme of the whole article is based upon drawing the attention of people to such proposals as are absolutely against Islam. Not a single word has been said against the advisability of reforms in State Laws, for the protection of Rights of Women as bestowed by Islam. Therefore I can only most emphatically deny such insinuations.

Point No. 2 is: whether the object of these reforms is to abolish polygamy by State Legislations or whether the object is to give women adequate protection against its abuses.

The position in regard to polygamy is, that it is definitely allowed in Islam: a fact which has been graciously conceded by some supporters of the Commission while others insist that it was an emergency concession, etc., etc.

Nevertheless, the concluding recommendations of the Commission, in effect, would result in the complete reversal of the Islamic Marriage Laws, and the Commission's efforts will indeed remain stupendous in the admirable way they have disguised and justified the fact that, by bodily lifting the western practices of marriage and divorce and imposing them upon Muslims, they are actually enforcing the 'spirit' of Islam.

But for the unequivocal rejection of these proposals by Maulana Ehtishamul Huq Saheb—the only member of the Marriage Commission, recognized as a genuine scholar and authentic student of Islam—thousands would have been misled into believing (by the parallels drawn now from the Quran, now from the Sunnah, now from the Imams and now from Iqbal) that what has been recommended by the Commission is the highest and purest interpretation of Islam.

When a body, consisting of a majority of members, who are neither recognized as students of Islam, nor perhaps even have a

sufficient command over the Arabic language to enable them not study Islam in its original in form is provided with the opportuity of expressing authoritative 'Recommendations' on matters which have a direct bearing on our religion, it is not surprising that the results should be so confusing and embarrassing for the nation.

Such a selection does not reflect any credit to the intelligence of the appointers, nor integrity of purpose to the acceptors.

The main point of difference therefore really boils down to being clear on whether it is Islam that is to be changed, or whether it is the Rights of Women which need to be protected in accordance with Islam.

If it be the Rights of Women, what cause withholds anyone from giving the Islamic way of proving its efficiency in safeguarding these rights? Has anyone honestly given this a trial during the last 250 years? Has anyone honestly devoted and exhausted all sources of research and exploration? Is it too much to expect from Pakistan to start reforms in the Islamic way, give them a practical trial, and then, should they still prove that Islam has betrayed its women, seek other alternatives? At least, there would then be some justification in what Hunter declares in the *Indian Musalmans* that 'No young man, whether Hindu or Musalman, ever passes through our Anglo-Indian schools, without learning to disbelieve the faith of his fathers. The luxuriant religions of Asia shrivel into dry sticks when brought into contact with the icy realities of Western science. In addition to the rising generation of the sceptics we (i.e. the British) have the support of the comfortable classes,' etc., etc.

Surely no Muslim child, woman, or man, with any self-respect would wish it proved that Islam shrivels up into a dry stick, even after obtaining its freedom. Imitation is the best form of flattery, but we also know that imitation or flattery has never commanded respect. In case imitation be preferred, even to the extent of surrendering your sacred faith, allow me the privilege, ladies, of continuing to disagree with you. For, to my humble ways of thinking, it is the most painful insult to one's own Faith, to even remotely suggest or imply that it will remain defective and incomplete, unless and until it adopts bits and pieces from here and there, which completely reverse the original position; and for its perfec-

tion and completion, the examples and guidance of our Prophet have been outmoded, by the change of times.

If by persisting in this theory, I have qualified as the arch offender against Muslim womanhood, I can only take it as a compliment and a tribute.

On the other hand, to those of my sisters who have been misled into believing that either they remain good Muslims and continue to suffer eternally or change Islam itself, I can only offer the most emphatic guarantee and assurance, that the choice for Muslim Women is NOT suffering, but to know HOW to utilize our safeguards, and HOW to implement the Islamic Laws, without giving our worst critic a chance of saying that 'a section of Muslims have revolted against portions of the Quran and against Prophet and have found it convenient to adopt the dynamic western ideals, although they have made unsuccessful attempts to cover it up by labelling it as Islam.

To those who declare their resolve to fight tooth and nail against me, I can only suffer disappointment. For in me they have an imaginary rival. As an individual, I have nothing to gain or lose by these Marriage Laws, nor does my criticism contain anything new or original. Every argument has been based upon the Quran and Sunnah, which is as old as the Quran itself.

The sacred prestige of our Faith is at stake, and not the views of X.Y.Z. or the Marriage Commission or Abida Sultana.

To draw your attention to this is all that is in my power, and I can only repeat my appeal to all Musilm men and women, including my critics: to review their position, before they surrender to being referred to as 'shrivelled up dry sicks.'

The sufferings of those remarkable ignorant Muslim women, who have for centuries suffered the abuses of polygamy with silent resignation, because they rightly or wrongly believed that they were sacrificing their entire lives for the glory of Islam, have commanded far greater respect and admiration than the enlightened few will ever do by sacrificing Islam for holding up their personal pride and prejudices.

Yours, etc.

Princess Abida Sultana

KARACHI